No. 05-5992

Title:	Jacob Zedner, Petitioner v. United States
Docketed:	August 25, 2005
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(04-0821)
Decision Date:	March 8, 2005
Rehearing Denied:	May 24, 2005

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 22 2005	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 26, 2005)
Sep 21 2005	Order extending time to file response to petition to and including October 26, 2005.
Oct 18 2005	Order further extending time to file response to petition to and including November 25, 2005.
Nov 22 2005	Brief of respondent United States in opposition filed.
Dec 7 2005	Reply of petitioner Jacob Zedner filed. (Distributed)
Dec 8 2005	DISTRIBUTED for Conference of January 6, 2006.
Jan 6 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 10 2006	Motion to appoint counsel filed by petitioner Jacob Zedner.
Jan 25 2006	Motion DISTRIBUTED for Conference of February 17, 2006.
Feb 21 2006	Motion to appoint counsel filed by petitioner GRANTED. Edward S. Zas, Esquire, of New York, N.Y. is appointed to serve as counsel for the petitioner in this case.
Feb 21 2006	Joint appendix filed.
Feb 21 2006	Brief of petitioner Jacob Zedner filed.
Mar 6 2006	SET FOR ARGUMENT on Tuesday, April 18, 2006.
Mar 21 2006	Record received from U.S.C.A. for Second Circuit. (2 boxes)
Mar 23 2006	CIRCULATED.
Mar 24 2006	Record received from U.S.D.C. for Eastern District of New York. (1 box)
Mar 28 2006	Brief of respondent United States filed.
Apr 10 2006	Reply of petitioner Jacob Zedner filed. (Distributed)
Apr 18 2006	Argued. For petitioner: Edward S. Zas, New York, N.Y. (Appointed by this Court.) For respondent: Daryl Joseffer, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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No. 04- 05-8392

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD S. ZAS
Counsel of Record

THE LEGAL AID SOCIETY
FEDERAL DEFENDER DIVISION
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 417-8742

Attorney for Petitioner
JACOB ZEDNER

Questions Presented

The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2005), requires the government to bring a criminal defendant who pleads not guilty to trial within 70 days, excluding certain specified periods. 18 U.S.C. § 3161(c)(1) & (h). If this time limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be either "with or without prejudice." 18 U.S.C. § 3162(a)(2). The Act specifies only one way in which a defendant may waive this right to dismissal, i.e., by not moving to dismiss before trial. 18 U.S.C. § 3162(a)(2).

This case presents two questions that divide the courts of appeals:

1. Whether, in light of the statute's text and Congress's goal of protecting the public interest in prompt criminal trials, the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, the issue left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000).

2. Whether a violation of the Speedy Trial Act's 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis, despite the statute's mandatory language stating that, in the event of a violation, the "indictment shall be dismissed."

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement of the Case 2

Introduction 2

The Speedy Trial Act: An overview 2

The speedy trial waiver "for all time" 3

The speedy trial motion 4

The trial and sentence 5

The Second Circuit's decision 6

Reasons for Granting the Writ 10

I.

The Second Circuit's waiver holding exacerbates a longstanding and acknowledged circuit split and contravenes the Speedy Trial Act. 12

A. The circuits are deeply divided over whether compliance with the Speedy Trial Act may be excused on grounds of waiver 13

1. The "no waiver" position: The Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits 14

2. The "broad waiver" position: The Eleventh and District of Columbia Circuits 18

3. The "intermediate waiver" position: The First, Second, Fourth, and Seventh Circuits 18

B. The Second Circuit's waiver holding is inconsistent with the statute and contravenes basic rules of statutory construction as enunciated by this Court 22

1. The Second Circuit's waiver rule contravenes the Act's text. 22

2. The Second Circuit's waiver rule is inconsistent with the Act's history and purposes 26

II.

The Second Circuit's decision to apply harmless-error analysis deepens a split in the circuits, violates the text and structure of the Act, and conflicts with this Court's decisions in United States v. Taylor, 487 U.S. 326 (1988) and Alabama v. Bozeman, 533 U.S. 146 (2001) . . . 27

A. The circuits are divided over whether a violation of the Act's 70-day time limit is subject to harmless-error analysis 28

B. The Second Circuit's decision to apply harmless-error analysis violates the text of the Act and conflicts with this Court's decisions in Taylor and Bozeman. 33

Conclusion 40

TABLE OF AUTHORITIES

Cases

Alabama v. Bozeman, 533 U.S. 146 (2001) . . . . . passim

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 24, 25

Barnhill v. Johnson, 503 U.S. 393 (1992) 26

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 22

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) . . 10

Dodd v. United States, 125 S. Ct. 2478 (June 20, 2005) . . . 24

Greenup v. United States, 401 F.3d 758
Nos. 03-6530, 03-6580 (6th Cir. Mar. 29, 2005),
ordered unpublished (6th Cir. June 2, 2005),
reh'g en banc denied (6th Cir. Aug. 2, 2005) 13, 17

Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195
(6th Cir. 2004) 18

Henderson v. United States, 476 U.S. 321 (1986) 8

Lamie v. United States Trustee, 540 U.S. 526 (2004) 34

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) . 38

New York v. Hill, 528 U.S. 110 (2000) . . . . . passim

Richards v. United States, 369 U.S. 1 (1962) 34

Williford v. United States, 469 U.S. 893 (1984) 12

United States v. Alexander, 529 F. Supp. 452
(D.C. Colo. 1982) 3

United States v. Antonio, 705 F.2d 1483 (9th Cir. 1983) . . . 30

United States v. Blackwell, 12 F.3d 44
(5th Cir. 1994) . . . . . passim

United States v. Brenna, 878 F.2d 117 (3d Cir. 1989) 28

United States v. Caparella, 542 F. Supp. 826 (E.D.N.Y. 1982) 3

United States v. Carey, 746 F.2d 228 (4th Cir. 1984) . . . . . passim

United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981) . . . . . passim

United States v. Crane, 776 F.2d 600 (6th Cir. 1985) 11, 28, 29, 30

United States v. Doran, 882 F.2d 1511 (10th Cir. 1989) . . . 28

United States v. Dunbar, 357 F.3d 582 (6th Cir. 2004), vacated, 125 S. Ct. 1029 (2005) 28

United States v. Friemann, 2005 WL 1427503, No. 04-5506-CR (2d Cir. Jun. 15, 2005) (unpublished) . . . 33

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995) 6, 11, 28, 31

United States v. Garrett, 720 F.2d 705 (D.C. Cir. 1983) . . . 28

United States v. Goykhman, 2005 WL 714124, No. 04-3278-CR (2d Cir. Mar. 29, 2005) (unpublished) . . . 33

United States v. Hastings, 847 F.2d 920 (1st Cir. 1988) . . . 28

United States v. Howard, No. 94-6543, 1997 WL 705077 (6th Cir. 1997) (unpublished) 18, 30

United States v. Janik, 723 F.2d 537 (7th Cir. 1983) . . 21, 35

United States v. Johnson, 29 F.3d 940 (5th Cir. 1994) 28

United States v. Jones, 887 F.2d 492 (4th Cir. 1989) 28

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 14, 18, 19, 20

United States v. Koory, 20 F.3d 844 (8th Cir. 1994) 28

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 14, 18, 19

United States v. Lewis, 349 F.3d 1116 (9th Cir. 2003) 28

United States v. MacDonald, 435 U.S. 850 (1978) 5

United States v. Marshall, 935 F.2d 1298 (D.C. Cir. 1991) 14, 18

United States v. McSwain, 197 F.3d 472 (10th Cir. 1999) . . . 16

United States v. Mezzanatto, 513 U.S. 196 (1995) 22

United States v. Montalvo-Murillo, 495 U.S. 711 (1990) . . . 37

United States v. Pasquale, 25 F.3d 948 (10th Cir. 1994) 14, 16

United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983) 11, 17, 29, 30, 31

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 14, 18, 19

United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) 14, 17

United States v. Ray, 768 F.2d 991 (8th Cir. 1985), overruled by Henderson v. United States, 476 U.S. 321 (1986) 14, 17

United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir. 1993) 16

United States v. Smith, 415 F.3d 682 (7th Cir. July 18, 2005) . . . . . passim

United States v. Strand, 566 F.2d 530 (5th Cir. 1978) 12

United States v. Taylor, 487 U.S. 326 (1988) . . . . . passim

United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997) 14, 18

United States v. West, 142 F.3d 1408 (11th Cir. 1998), vacated, 526 U.S. 1155 (1999) 14, 18

United States v. Willis, 958 F.2d 60 (5th Cir. 1992) . . . . . passim

Statutes and Rules

18 U.S.C. § 3161 1

18 U.S.C. § 3161(c)(1) . . . . . passim

18 U.S.C. § 3161(h) . . . . . passim

18 U.S.C. § 3161(h)(8)(A) . . . . . passim

18 U.S.C. § 3162(a)(2) . . . . . passim

18 U.S.C. § 5036 (West 2005) 25

18 U.S.C. App. 2, § 2 37

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2111 . . . . . 1, 8, 38

Fed. R. Crim. P. 1(a) 32

Fed. R. Crim. P. 52(a) 1, 8, 32, 38

Other Authorities

A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Fed. Jud. Center 1980) . . . passim

Prepared Statement of Assistant Attorney General William H. Rehnquist, Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. at 107 (1971) 40

H.R. 7107, 92d Cong., 1st Sess. (1971) 38

S. 895, 92d Cong., 1st Sess. (1971) 38

Petition for a Writ of Certiorari

Petitioner Jacob Zedner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction.

Opinions Below

The Second Circuit's opinion is reported at 401 F.3d 36. A. 2-30.[1] The district court's decision denying Mr. Zedner's motion to dismiss the indictment under the Speedy Trial Act is unpublished. That decision is reproduced at A. 36-51. The judgment of conviction appears at A. 31-35.

Jurisdiction

The Second Circuit's judgment was entered on March 8, 2005. The Second Circuit's order denying rehearing and rehearing en banc was entered on May 24, 2005. A. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

This case principally involves the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2005) ("the Act"). The court of appeals also cited the provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). The text of these statutes and of Rule 52(a) is reproduced in the Appendix at A. 52-63.

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[1] References to "A." are to the attached Appendix.

Statement of the Case

Introduction

This criminal prosecution began almost a decade ago. On March 12, 1996, Jacob Zedner was arrested for repeatedly attempting to open a bank account using a phony $10 million "bond." A. 3-4. The document fooled nobody because it contained obvious misspellings (e.g., "Onited States," "Thunted States," "Cgicago") and other indicia that it could not possibly be real. A. 3-4 & n.1.

On April 4, 1996, Zedner was indicted for bank fraud in the Eastern District of New York. A. 4. Absent permissible exclusions of time, the Speedy Trial Act required that he be brought to trial within 70 days of his indictment, i.e., by June 13, 1996. See 18 U.S.C. § 3161(c)(1) & (h). Mr. Zedner was not tried until April 7, 2003 (A. 8), more than seven years after his indictment and more than two years after he requested a trial "as soon as possible." A. 7. The Second Circuit held, however, that any violation of the 70-day time limit was waived or was a "harmless error." A. 15, 20.

The Speedy Trial Act: An overview

The Speedy Trial Act mandates that a federal criminal trial must begin within 70 days of the filing date of the indictment or the defendant's first appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). The Act automatically excludes numerous kinds of pre-trial delays from the 70-day limit. 18 U.S.C. § 3161(h)(1)-(7). The Act also grants courts flexibility to exclude other delays, including delays granted at the defendant's request, but only if the court "sets forth, in the record of the case, either

orally or in writing, its reasons for finding that the ends of justice ... outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). This exclusion is commonly known as an "ends of justice" exclusion.

The sanction for a violation of the 70-day time limit is dismissal of the indictment. 18 U.S.C. § 3162(a)(2). The court has discretion to dismiss the indictment with or without prejudice to re-prosecution, depending on various factors, such as the seriousness of the offense, the facts and circumstances that led to the violation, the prejudice, if any, to the defendant, and the impact of reprosecution on the administration of the Act and on the administration of justice. 18 U.S.C. § 3162(a)(2); United States v. Taylor, 487 U.S. 326 (1988). The Act provides only one way in which a defendant may waive his right to dismissal: i.e., by not moving to dismiss prior to trial. 18 U.S.C. § 3162(a)(2).

The speedy trial waiver "for all time"

Mr. Zedner's case was assigned to a judge who had previously described the Speedy Trial Act as "an 'abomination.'" United States v. Caparella, 542 F. Supp. 826, 827 (E.D.N.Y. 1982) (quoting United States v. Alexander, 529 F. Supp. 452, 456 (D.C. Colo. 1982)). On November 8, 1996, after granting several adjournments, the court became concerned that Zedner might request a speedy trial at an inconvenient time. A. 4. Accordingly, the court asked him, as a condition of obtaining future adjournments, to execute a blanket waiver of his constitutional and statutory speedy trial rights "for all time." A. 4-5. The court told Mr. Zedner and his

counsel that it had taken the position that such a waiver was enforceable and that "nobody has yet challenged [this position]." Transcript, Nov. 8, 1996, at 4.

The speedy trial motion

After Zedner signed this waiver, his trial was slow in coming. By March of 2001, he had still not been tried, despite his request six months earlier for a trial "as soon as possible." A. 7. At that point, he had been living under the stress and cloud of a federal indictment, as well as bail restrictions, for half a decade. Accordingly, on March 7, 2001, Zedner, represented by new counsel, moved to dismiss the indictment with prejudice under the Speedy Trial Act. A. 7-8. The basis for the motion was that more than 70 non-excluded days had elapsed, including: 1) 91 days that passed between January 31, 1997, and May 2, 1997; and, 2) 165 days that elapsed between September 23, 2000, and March 7, 2001. A. 7-8, 10.

On March 21, 2001, the district court denied the speedy trial motion. A. 36-51. The court found this single-defendant case to be "complex" and ruled enforceable the waiver in perpetuity executed by Mr. Zedner in 1996. A. 36-37.[2] The court reasoned that, because a defendant may waive his right to a speedy trial by

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[2] The court also held that Zedner had waived his right to dismissal by not moving to dismiss before his trial was originally scheduled to commence in October of 1998. A. 37. The Act, however, only required Zedner to move for dismissal "prior to trial." 18 U.S.C. § 3162(a)(2). Zedner moved to dismiss in March of 2001, more than two years before he was tried in April of 2003. The Second Circuit did not rely on this alternative waiver rationale offered by the district court.

inaction (i.e., by not moving to dismiss before trial), see 18 U.S.C. § 3162(a)(2), a defendant "most certainly may waive such rights by affirmative action as he has done voluntarily and under oath, with the advice of counsel, here." A. 36-37.[3]

The trial and sentence

Mr. Zedner's trial finally went forward on April 7, 2003. His defense was that he lacked the intent to defraud because he suffered from delusions that caused him to believe that his obviously phony bond was genuine. A. 8. The prosecutor had successfully delayed the trial for several years, over the defense's objection, by citing Zedner's delusions, persuading both the district court and the court of appeals that they were so severe that they rendered Zedner mentally incompetent for a time. See, e.g., A. 7-8, 37-45. At trial, however, when defense counsel cited these delusions to show Zedner's lack of fraudulent intent, the same prosecutor suddenly switched positions and argued, contrary to all the medical evidence (including the report of the government's own doctors), that Zedner was faking his delusions.[4]

On April 15, 2003, the jury convicted Mr. Zedner on all

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[3] The district court's speedy trial ruling was not appealable until after Mr. Zedner was convicted more than two years later. See United States v. MacDonald, 435 U.S. 850, 863 (1978) (defendant may not, before trial, appeal order denying speedy trial motion).

[4] Mr. Zedner argued on appeal that this shift in positions was cognizable as a plainly erroneous denial of due process that likely resulted in the conviction of a person who, by reason of mental illness, was innocent. The Second Circuit did not address this issue in its opinion.

counts. He was sentenced to 63 months in prison, based on the court's finding that, because Zedner presented his $10 million "bond" to six banks, he was responsible for an intended "loss" of $60 million under the Sentencing Guidelines.[5]

The Second Circuit's decision

The Second Circuit affirmed the denial of Zedner's speedy trial motion. The court, however, did not rely on the waiver "for all time," noting that such a waiver "may be ineffective." A. 12. The court reasoned, "Th[e] public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." A. 12; see also United States v. Gambino, 59 F.3d 353, 360 (2d Cir. 1995) (defendants "generally" may not waive the Act's requirements).

Nevertheless, the court held that Zedner implicitly waived his right to dismissal based on the delay between January 31, 1997, and May 2, 1997, because Zedner's former counsel had requested this delay to further "investigate" whether the misspelled "Onited States" bond was genuine.[6] A. 15. No relief was warranted, the court of appeals determined, because this delay was "reasonable" and "could have" been -- but admittedly was not (see A. 5) --

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[5] The Second Circuit remanded for re-sentencing to ensure that the district court understood its authority to depart downward from the then-mandatory Guideline range. A. 25-30.

[6] Although this case had already been pending for almost a year, the district court granted defense counsel this additional 91-day continuance on January 31, 1997, citing the waiver "for all time," without making any "ends of justice" findings. Of course, no evidence of the authenticity of Zedner's "bond" was ever uncovered.

excluded from the Speedy Trial Act clock in accordance with the "ends of justice" procedures required by 18 U.S.C. § 3161(h)(8)(A). A. 15.

The Second Circuit recognized that the circuits are divided over whether a waiver may be found where the delay could have been, but was not, properly excluded. A. 12-15. After reviewing the conflicting approaches of various circuits, the Second Circuit held that recognition of implicit waivers was appropriate. The court declined to define the scope of its waiver rule, holding: "At the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15. But see 18 U.S.C. § 3161(h)(8)(A) ("No ... period of delay resulting from a continuance granted by the court [at the request of the defendant] shall be excludable ... unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.").

The Second Circuit also denied relief based on the 165-day delay between September 23, 2000, and March 7, 2001. This delay occurred after the district court took the government's motion to determine Zedner's competency "under advisement" on August 23, 2000. A. 7. The court had 30 days from that point, i.e., until

September 23, 2000, to resolve the competency motion before the speedy trial clock would start ticking again. A. 16 n.4; 18 U.S.C. § 3161(h)(1)(J) (excluding "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."); see also Henderson v. United States, 476 U.S. 321, 328-29 (1986) (Act "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' i.e., 30 days from the time the court receives all the papers it reasonably expects...."). For reasons the district court never explained, the competency motion was not resolved until March 21, 2001, and only after Zedner moved to dismiss pursuant to the Speedy Trial Act. A. 7-8.

The Second Circuit did not decide whether this unexplained delay exceeded the Act's 70-day time limit, holding that any violation during this period was a "harmless error." A. 20.[7] The Act requires that the "indictment shall be dismissed" upon request if the 70-day limit is exceeded. 18 U.S.C. § 3162(a)(2). Nevertheless, the Second Circuit held that "harmless error analysis is appropriate in Speedy Trial Act cases" (A. 18), pursuant to 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a), because "there are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful." A. 19. The court concluded that a mandatory dismissal without prejudice

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[7] The Second Circuit did not and could not rely on waiver principles to excuse this delay, because Zedner had specifically requested a trial "as soon as possible" before the delay occurred.

can be "costly" and "illogical:"

> A case tried to satisfactory conclusion a few days later than the Act specifies, without substantial adverse effect on anyone, can require costly retrial a year or more later, after appeal, dismissal of the indictment, and reindictment, in a manner causing vast expense, inefficiency, unfairness, and unjustifiable delay in the administration of justice. We see no reason to believe Congress intended such illogical results.

A. 19.

The Second Circuit went on to hold that the 165-day delay in this case was "harmless" and "technical." A. 17, 20. The court reasoned that, after this long delay occurred, Zedner was found incompetent, so he must have been incompetent ever since August of 2000, and, therefore, he could not have been tried during this particular period.[8] A. 16, 20. This rationale, however, does not explain the district court's failure to resolve the competency issue until long after the speedy trial clock had expired. And the Second Circuit overlooked the broader harm: If the unexplained 165-day delay had not occurred, Zedner could have been treated for his incompetency and tried 165 days sooner.

Petitioner sought rehearing. He argued, inter alia, that the court's refusal to order dismissal, on harmless-error grounds, violated the plain language of Section 3162(a)(2) and conflicted with this Court's unanimous decision in Alabama v. Bozeman, 533

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[8] The Second Circuit also noted that defense counsel had a difficult pregnancy as of "late November 2000." A. 16. The district court never cited this factor (or any other) as a basis for the delay. Indeed, as the Second Circuit acknowledged, there is no evidence the district court even knew of counsel's pregnancy complications. A. 7 n.2.

U.S. 146 (2001). Rehearing was denied on May 24, 2005. A. 1.

Reasons for Granting the Writ

This case presents an ideal opportunity for this Court to resolve two important questions that divide the courts of appeals concerning the proper interpretation and application of the Speedy Trial Act. The first issue was left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000): May a defendant waive the requirements of the Act, either explicitly or implicitly, by seeking a trial date beyond the 70-day time limit? Certiorari is warranted because, as the Second Circuit recognized, the circuits are deeply split over this frequently recurring issue. A. 12-15. Moreover, the Second Circuit's waiver holding is inconsistent with the Act's text, structure, and central purpose: to protect society's interest in the prompt resolution of criminal trials "whether or not prosecutors or defendants perceive speed to be in their interest." A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 34 (Fed. Jud. Center 1980) [hereinafter "Partridge"]; see also United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) ("The Act is intended to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved."). Further, the Second Circuit's disregard of the Act's procedural requirements for an "ends of justice" exclusion violates this Court's "cardinal canon" of statutory construction: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254

(1992). See Point I, infra.

Granting review in this case will also allow the Court to resolve a related issue upon which the courts of appeals are also divided: May the Act's mandatory sanction of dismissal be avoided on grounds of harmless error? When it decided this case, the Second Circuit was the only circuit to hold that the mandatory dismissal provisions of Section 3162(a)(2) permit an untimely conviction to be affirmed on grounds of harmless error. A. 16-20; Gambino, 59 F.3d at 363. The Seventh Circuit has since followed the Second Circuit's holding. United States v. Smith, 415 F.3d 682 (7th Cir. July 18, 2005). Every other circuit holds, expressly or by implication, that harmless-error analysis and similar prudential doctrines are inapplicable because the Act makes dismissal mandatory even in the absence of prejudice. See, e.g., United States v. Crane, 776 F.2d 600, 606 (6th Cir. 1985); United States v. Carey, 746 F.2d 228, 230 (4th Cir. 1984); United States v. Perez-Reveles, 715 F.2d 1348, 1353-54 (9th Cir. 1983); and authorities cited infra, p. 28 n.14. Thus, there is a 10-to-2 circuit split on this issue. Review is also warranted because the Second Circuit's harmless-error holding does violence to the unambiguous "shall be dismissed" language of the Act, see United States v. Taylor, 487 U.S. 326, 332 (1988), and conflicts with this Court's unanimous holding in Alabama v. Bozeman, 533 U.S. 146 (2001), which interpreted similar dismissal language in an analogous federal speedy trial statute to preclude harmless-error analysis. See Point II, infra.

Given the direct conflict among the circuits on these two important questions, and the Second Circuit's failure to heed the plain language of the Act, this Court's intervention is essential. After extensive debate, Congress passed, and the President signed, the Speedy Trial Act to provide a uniform national rule to expedite federal criminal trials, with compliance ensured by the mandatory sanction of dismissal (with or without prejudice). See generally United States v. Strand, 566 F.2d 530, 532-33 (5th Cir. 1978); Partridge, at 11-34. Yet, because of the conflicting waiver and harmless-error rulings of the various circuits, a defendant's (and the public's) statutory right to a speedy trial "now depends almost as much on the happenstance of geography as it does on the will of the Legislative Branch." Williford v. United States, 469 U.S. 893, 894 (1984) (White, J., dissenting from the denial of certiorari in a Speedy Trial Act case).

I.

The Second Circuit's waiver holding exacerbates a longstanding and acknowledged circuit split and contravenes the Speedy Trial Act.

This case squarely presents the important and frequently recurring question left open in Hill, 528 U.S. at 117 n.2: Are the requirements of the Speedy Trial Act subject to waiver only in the narrow circumstances expressly mentioned in the statute?

Hill held that a defendant, by seeking delay, could waive his right to be tried within the time periods set forth in Article III of the Interstate Agreement on Detainers ("IAD"). Id. at 118. The Court distinguished the IAD from the Speedy Trial Act, noting that

the time limits of the Speedy Trial Act begin to run automatically rather than upon request, that dismissal under the Speedy Trial Act may sometimes be without prejudice, and that the Speedy Trial Act expressly allows waiver under certain limited circumstances. Id. at 117 n.2. The Court cautioned, however, that "the question of waiver under the Speedy Trial Act is not before us today, and we express no view on the subject." Id.

This unresolved issue is squarely presented by this case. The issue is important to the day-to-day conduct of federal prosecutions, has divided the courts of appeals for many years, and frequently recurs. Moreover, the Second Circuit's resolution of the waiver issue is inconsistent with the text, structure, and purposes of the Act, and violates settled rules of statutory construction as enunciated by this Court.

A. The circuits are deeply divided over whether compliance with the Speedy Trial Act may be excused on grounds of waiver.

As the Second Circuit discussed, the courts of appeals are in conflict over whether compliance with the requirements of the Act may be excused on a waiver theory. A. 12-15. In fact, the circuit split is even more pronounced and developed than the Second Circuit recognized.

The circuits have adopted three distinct positions on the waiver question: 1) the "no waiver" position (adopted by the Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits);[*] 2) the

[*] See, e.g., United States v. Carrasquillo, 667 F.2d 382, 391 (3d Cir. 1981); United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994); Willis, 958 F.2d at 64 (5th Cir. 1992); Greenup v. (continued...)

"broad waiver" position (adopted by the Eleventh and District of Columbia Circuits);[10] and, 3) the "intermediate waiver" position (adopted in different forms by the First, Second, Fourth, and Seventh Circuits).[11]

1. The "no waiver" position: The Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits

Six circuits -- the Third, Fifth, Sixth, Eighth, Ninth and Tenth -- hold that a court's failure to comply with the requirements of the Act may not be excused on grounds of express or implied waiver (except in the narrow circumstances provided by the statute). More specifically, these circuits hold that, absent proper "ends of justice" findings, see 18 U.S.C. § 3161(h)(8)(A), a delay caused or requested by the defendant "shall not be excludable," id., on a waiver theory or otherwise. See supra, p. 13 n.9.

The Fifth Circuit adopted its "no waiver" position in Willis. 958 F.2d at 64. There, the defendant requested additional time to

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[9] (...continued)
United States, 401 F.3d 758, 764, Nos. 03-6530, 03-6580 (6th Cir. Mar. 29, 2005), ordered unpublished (6th Cir. June 2, 2005), reh'g en banc denied (6th Cir. Aug. 2, 2005); United States v. Ray, 768 F.2d 991, 998 n.11 (8th Cir. 1985), overruled on other grounds, Henderson v. United States, 476 U.S. 321 (1986); United States v. Ramirez-Cortez, 213 F.3d 1149, 1154 (9th Cir. 2000); United States v. Pasquale, 25 F.3d 948, 951-52 (10th Cir. 1994).

[10] See United States v. West, 142 F.3d 1408, 1412 (11th Cir. 1998), vacated on other grounds, 526 U.S. 1155 (1999); United States v. Twitty, 107 F.3d 1482, 1487 (11th Cir. 1997); United States v. Marshall, 935 F.2d 1298, 1302 (D.C. Cir. 1991).

[11] A. 15; United States v. Pringle, 751 F.2d 419, 434-36 (1st Cir. 1984); United States v. Keith, 42 F.3d 234, 239-40 (4th Cir. 1994); United States v. Kucik, 909 F.2d 206, 210-11 (7th Cir. 1990).

prepare for trial and, at the prompting of the district court, waived his speedy trial rights. Id. at 60-61. The court then granted an open-ended continuance until the defendant indicated he was ready for trial. Id. at 62. The defendant later moved unsuccessfully to dismiss the indictment based on the resulting period of delay. Id. The Fifth Circuit, however, reversed the defendant's conviction. The court held that the Act's requirements may not be waived explicitly by affirmative agreement, and that a broad exception would swallow this rule. The court noted that "the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous to seek dismissal under the Act." Id. at 64. But, the Fifth Circuit held, "[a] district court is not sandbagged or otherwise misled ... by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." Id. The court recognized that the "no waiver" rule would be "meaningless if ... the defendant waives his ability to move for dismissal ... simply by asking for or agreeing to a continuance." Id. The Fifth Circuit therefore charged district courts with the responsibility of ensuring that any request for a continuance, even one sought or agreed to by the defendant, "falls within one of the Act's exceptions." Id.

The Fifth Circuit "reemphasize[d]" this "bright line" rule in Blackwell, 12 F.3d at 48. That case reaffirmed that waiver principles were inapplicable even though the defendant had requested the delay in question in order to prepare his defense.

Id. at 46. The Fifth Circuit wrote:

> Today we reemphasize that Willis provides a bright line for the district courts to follow. In the absence of contemporaneous, articulated on-the-record findings for extending the time for trial past seventy days amounting to an acceptable ends of justice analysis, Defendant-Appellant is entitled to have his case dismissed. See 18 U.S.C. § 3162(a)(2).

Id. at 48.

The Tenth Circuit takes a similar "no waiver" view. In Pasquale, 25 F.3d at 952-53, the court reversed the defendant's conviction, even though defense counsel had requested a trial date beyond the 70-day period. The Tenth Circuit rejected the government's argument that, "because 'each of these continuances was granted at the specific request of the defendant' he may not claim that the Act was violated by their grant." Id. at 952. The court held that "'[t]he fact that the defendant has requested the continuance ... is not in itself sufficient to toll the operation of the time limits.'" Id. (citations omitted). A "motion for a continuance does not constitute a waiver of the Act, as any 'waiver' by the Defendant is necessarily invalid unless the court simultaneously makes 'ends of justice findings.'" Id. (quoting United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir. 1993)).[12]

The Third Circuit adopted the "no waiver" position in Carrasquillo. In that case, the trial date was put off beyond the

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[12] The waiver question has caused conflict and confusion even within the Tenth Circuit. See United States v. McSwain, 197 F.3d 472, 483 (10th Cir. 1999) (rejecting pro se defendant's arguments under the Speedy Trial Act, without citing Pasquale or Saltzman, on the ground that the defendant "waived his right to a speedy trial").

70-day limit at the request of defense counsel, but no "ends of justice" findings were made. 667 F.2d at 383, 385. In an alternative holding reversing the conviction, the court held that defense counsel's action did not waive the Act's requirements. Id. at 388-90.

> We do not think a defendant may waive the public's right to a speedy trial unless he complies with the requirements carefully set forth in section 3161(h). Alternative arrangements should be made only when the court specifically finds "that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." We do not find excludable time under a "waiver" theory.

Id. at 390; see also id. at 391 (Higginbotham, J., concurring) (agreeing that reversal was required because the Act's language and legislative history made "so clear" that the Act's requirements could not be waived).

The Eighth Circuit followed the Third Circuit's "no waiver" rule in Ray, 768 F.2d at 998 n.11. The court held that a defendant's written consent to be tried beyond the Act's 70-day period did not excuse the district court's failure to make "ends of justice" findings under Section 3161(h)(8)(A). Id. (citing Carrasquillo, 667 F.2d at 389-90).

The Ninth Circuit has similarly held a court's failure to make "ends of justice" findings may not be excused on a waiver theory. See Ramirez-Cortez, 213 F.3d at 1156; Perez-Reveles, 715 F.2d at 1352-55. The Sixth Circuit has also concluded, in unpublished decisions, that the Act's requirements cannot be waived. See, e.g., Greenup, 401 F.3d at 764 (purported "waiver was ineffective"

absent "ends of justice" findings); United States v. Howard, No. 94-6543, 1997 WL 705077, at *5 n.4 (6th Cir. 1997)(dictum).[13]

2. The "broad waiver" position: The Eleventh and District of Columbia Circuits

Two circuits -- the Eleventh Circuit and the District of Columbia Circuit -- enforce a defendant's express waiver of the Act's requirements, so long as the waiver was entered knowingly and voluntarily. See West, 142 F.3d at 1412; Twitty, 107 F.3d at 1487; Marshall, 935 F.2d at 1302. Thus, these circuits require no "ends of justice" findings so long as a defendant has entered a waiver. These circuits appear to place no limit, either causal or temporal, on a Speedy Trial Act waiver.

3. The "intermediate waiver" position: The First, Second, Fourth, and Seventh Circuits

The remaining circuits -- the First, Second, Fourth and Seventh -- have crafted what they describe as an "intermediate" or "middle" position. E.g., A. 14-15. On the one hand, these courts agree with the vast majority of courts that a defendant may not expressly waive the Act's requirements. On the other hand, these courts also hold that a defendant is not entitled to dismissal based on a delay that the defendant caused or requested, even if the procedural requirements of the Act were not satisfied. A. 15; Pringle, 751 F.2d at 434-36; Keith, 42 F.3d at 239-40; Kucik, 909 F.2d at 210-11.

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[13] Although unpublished decisions are not binding precedent in the Sixth Circuit, they "nevertheless can be persuasive authority." Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 205 n.3 (6th Cir. 2004) (citations omitted). Petitioner includes them here in the interests of completeness.

In Pringle, a defendant sought three continuances. 751 F.2d at 432. The third motion stated that the defendants "waive their rights to a speedy trial." Id. at 433. The district court granted the motion and scheduled trial for two months later. However, the trial was not held, and an additional five months passed before the filing of a motion stopped the speedy trial clock. The record contained no explanation for the delay. The First Circuit remanded the case to determine the cause, instructing the district court to exclude the five-month period from the speedy trial calculation if the defendants' request for delay and purported waiver had induced the delay. Id. at 435-36. The First Circuit expressed concern that a contrary ruling would reward the defendants because "[i]n essence, defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver induced leisurely pace of the case as grounds for dismissal." Id. at 434.

The Seventh Circuit followed the First Circuit's reasoning in Kucik, 909 F.2d at 210-11. The court explained, expressing approval of Pringle, that a defendant who "actively participates in a continuance" cannot "then 'sand-bag' the court and the government by counting that time in a speedy trial motion." Id. at 211.

The Fourth and Second Circuits have taken yet another approach to the waiver question. In Keith, the prosecutor fell ill several days before trial was scheduled to start. 42 F.3d at 236. The district court granted the government's motion for a continuance in a written order that was signed by defense counsel as "[s]een and

agreed." Id. The defense attorney later reversed course and moved to dismiss the indictment on speedy trial grounds immediately before the rescheduled trial was to begin. After concluding that the order granting the continuance failed to meet the procedural requirements of the Section 3161(h)(8) "ends of justice" exception, the Fourth Circuit considered whether the defendant could use the delay acquiesced to by his counsel in support of his Speedy Trial Act claim. Id. at 238. The Fourth Circuit expressed concern about the breadth of the rule announced by the First Circuit in Pringle and by the Seventh Circuit in Kucik, which "would appear to find a waiver when a defendant consents to a continuance occasioned on any reason, including the district judge's desire to go fishing." Id. at 239 (emphasis in original). At the same time, the Fourth Circuit characterized the Fifth Circuit's rule in Willis as "too narrow." Id. The Fourth Circuit instead adopted a middle position, concluding that "if a defendant affirmatively consents to a motion for a continuance and the reasons for the granting of that motion as garnered from the record are sufficient to support a finding that the ends of justice would be met by granting the motion, the defendant cannot take advantage of that discrete period of time covered by the continuance in asserting a violation of the Speedy Trial Act." Id. at 240.

Similarly, in this case, the Second Circuit decided to follow the Fourth Circuit's approach in Keith and to reject the Fifth Circuit's approach in Willis. A. 12-14. The Second Circuit justified its decision, not by citing the Act's text or history,

but by invoking the court's own view of "the public interest:"

> We very much doubt that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request. In our view the public interest is not advanced either by allowing such a defendant to escape prosecution altogether, or by dismissing the indictment and reindicting with consequent wasteful reprosecution after a substantial additional delay. But see United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983).

A. 15. In Janik, to which the "but see" citation refers, the Seventh Circuit held that the Act's mandatory dismissal sanction serves a deterrence function and "is binding on us whatever we may think of its wisdom." 723 F.2d at 546. Judge Posner's opinion for the court added, "A judge may not forgive a violation merely because the sanction that the legislature has provided for the violation seems silly." Id.

The prejudice to petitioner and others resulting from this entrenched split of authority is plain. Had petitioner resided in any of the "no waiver" circuits, his conviction would have been vacated and the indictment dismissed, either with or without prejudice, based on the 91 days that elapsed in 1997 without any order of excludable delay or "ends of justice" findings.

It is also apparent that, absent Supreme Court review, the waiver question will continue to plague federal courts. Given the large number of circuit cases dealing with the waiver question, and the dramatic lack of consensus, there is no reason to believe that the lower courts will be able to resolve their disagreement without this Court's guidance.

B. The Second Circuit's waiver holding is inconsistent with the statute and contravenes basic rules of statutory construction as enunciated by this Court.

This Court should also grant certiorari because the Second Circuit's waiver rule is inconsistent with the text, structure, history, and purposes of the Act.

In general, most rights are subject to waiver, including rights that benefit society. See Hill, 582 U.S. at 114; United States v. Mezzanatto, 513 U.S. 196, 201 (1995). However, a "right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (emphasis added) (quoted in Hill, 528 U.S. at 116). Waiver of a statutory right is not allowed where there exists "affirmative indication of Congress' intent to preclude waiver...." Mezzanatto, 513 U.S. at 201.

Such is the case with the Speedy Trial Act. The statute's text, structure, and history demonstrate that Congress intended to preclude waiver, except in the limited circumstances expressly mentioned in the Act.

1. The Second Circuit's waiver rule contravenes the Act's text.

"The Speedy Trial Act is plain-speaking[,]" as the Fifth Circuit has noted. Blackwell, 12 F.3d at 46. Section 3161(h)(8)(A) permits a court to exclude delays granted "at the request of the defendant or his counsel[,]" but only if the court makes specified findings and sets forth reasons to support them. A court may exclude:

> Any period of delay resulting from a continuance granted by any judge on his own motion or **at the request of the defendant or his counsel** or at the request of the attorney for the Government, **if** the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. **No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.**

18 U.S.C. § 3161(h)(8)(A) (emphasis added).

This provision explicitly addresses the question considered by the Second Circuit: Does the speedy trial clock run when a court grants a continuance at the defendant's request? Congress provided a clear answer: "Yes," unless the court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Id. It is undisputed in this case that the district court never provided such reasons to justify the delay from January 31, 1997, to May 2, 1997. A. 5, 11.

The Second Circuit nevertheless held -- eight years after the fact -- that this period was excludable and that "ends of justice" findings were unnecessary. Under the Circuit's broad holding, a continuance granted at the defendant's request does not count for speedy trial purposes, whether or not "ends of justice" findings were made, so long as they "could have been" made. A. 15. This is

not statutory construction; it is statutory destruction. As this Court reiterated just this Term, courts "are not free to rewrite the statute that Congress has enacted." Dodd v. United States, 125 S. Ct. 2478, 2483 (June 20, 2005); see also Willis, 958 F.2d at 64 ("If Congress is troubled by the effects of the dismissal remedy in these cases, it may provide an additional exception under the Act for continuances requested by defendants. Until that time we are bound by the provisions of the Act.").

The Act explicitly provides for waivers, express and implied, only in narrow circumstances. In Section 3162(a)(2), Congress provided for an implied waiver only where the defendant fails to move for dismissal prior to trial. 18 U.S.C. § 3162(a)(2). Had Congress intended to allow implied waivers in other circumstances, it would have said so. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 454 (2002) ("If Congress meant to make a preenactment successor in interest ... liable, it could have done so clearly and explicitly.").

Similarly, Congress provided that a defendant may expressly waive her right, under 18 U.S.C. § 3161(c)(2), to be tried no sooner than 30 days after her first appearance with counsel. See 18 U.S.C. § 3161(c)(2) ("Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.") (emphasis added). In contrast, Congress chose not to allow the defendant to "consent[] in writing" (or orally) to a trial beyond

the 70-day time limit of Section 3161(c)(1). As this Court has held, "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Barnhart, 534 U.S. at 452 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

A comparison of the Speedy Trial Act with other federal speedy trial statutes further demonstrates that the Second Circuit's waiver holding is wrong. For example, as this Court noted in Hill, the Speedy Trial Act lacks the "party control" features that permit waiver of the IAD's speedy trial requirements. 528 U.S. at 117 n.2. Furthermore, the Speedy Trial Act is markedly different from the speedy trial provisions of the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5036 (West 2005), which provides that if a juvenile is not tried within 30 days of his detention, the information "shall be dismissed." Unlike the Speedy Trial Act, the FJDA provides exceptions to this rule if the delay was "caused by" or "consented to by the juvenile or his counsel," or if the delay "would be in the interests of justice in the particular case." Id. The omission of comparable exceptions from the text of the Speedy Trial Act, passed by the same Congress that passed the FJDA, must therefore have been deliberate. Under the Speedy Trial Act, delays are not excludable even if they were "caused by" or "consented to by" the defendant, unless the court complies with the "ends of justice" requirements of Section 3161(h)(8)(A).

2. The Second Circuit's waiver rule is inconsistent with the Act's history and purposes.

As shown above, the text of the Act, construed using accepted interpretive tools, makes clear that a defendant cannot waive the Act's requirements, except as the statute expressly provides. Accordingly, resort to the Act's legislative history is unnecessary. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (appeals to legislative history are well taken only to resolve statutory ambiguity). Nevertheless, to the extent the legislative history is relevant, it further refutes the Second Circuit's waiver holding.

When Congress amended the Speedy Trial Act in 1979, it made clear "in the strongest possible terms" that the sole reference to "waiver" in Section 3162(a)(2) was deliberate and that any attempt by courts to engraft additional waiver rules would be "contrary to legislative intent and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." Carrasquillo, 667 F.2d at 389 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 28-29 (1979)).

The "no waiver" circuits, citing the legislative history, have correctly held that the narrow waiver provisions of the Act are exclusive. See, e.g., Saltzman, 984 F.2d at 1091; Carrasquillo, 667 F.2d at 389. The Second Circuit, in contrast, ignores this history in favor of its own determination of the "public interest." A. 15.

In summary, the Second Circuit's judicially created waiver

rule is at odds with the Act. This Court should therefore grant review to resolve the deep circuit conflict on this issue.

II.

The Second Circuit's decision to apply harmless-error analysis deepens a split in the circuits, violates the text and structure of the Act, and conflicts with this Court's decisions in United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001).

This Court should also grant certiorari because the circuits are in conflict over the second important issue presented by this case: Whether a violation of the Act's 70-day time limit is subject to harmless-error analysis. The Second and Seventh Circuits hold, contrary to the other ten circuits, that a violation of the 70-day limit does not require dismissal of the indictment at all, unless prejudice is shown or other "substantial rights" are affected. Because the Act's mandatory dismissal provision is "by far its most effective enforcement mechanism," Willis, 958 F.2d at 64, this Court should resolve this deep circuit split.

Moreover, this Court's review is needed because the Second Circuit's decision to apply harmless-error analysis disregards the text, structure and purposes of the Act once again. To make the Act's 70-day time limit more than precatory, Congress made a deliberate policy decision. It decided that, to deter delays, a violation of the time limit always requires that the "indictment shall be dismissed" upon request. By making dismissal mandatory, Congress precluded harmless-error analysis. Instead, Congress granted courts flexibility to dismiss without prejudice where, for example, a violation is not severe and does not cause harm. The

Second Circuit, however, by requiring dismissal only where prejudice has been shown, improperly disregarded Congress's carefully considered policy decision as expressed in the Act's text.

A. The circuits are divided over whether a violation of the Act's 70-day time limit is subject to harmless-error analysis.

The Second and Seventh Circuits hold that Section 3162(a)(2) allows a conviction to be affirmed on harmless-error grounds, even though the 70-day time limit was exceeded. A. 19; Gambino, 59 F.3d at 363; Smith, 415 F.3d 682. In contrast, every other circuit holds that Section 3162(a)(2) means what it says: that the "indictment shall be dismissed" upon request in the event of a violation.[14]

Furthermore, at least three circuits -- the Fourth, Sixth and Ninth -- have specifically held that harmless-error principles and similar prudential doctrines cannot be used to avoid the statute's mandatory remedy of dismissal. See Crane, 776 F.2d at 606; Carey,

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[14] See, e.g., United States v. Hastings, 847 F.2d 920, 924 (1st Cir. 1988) ("[T]he court must order dismissal."); United States v. Brenna, 878 F.2d 117, 118 (3d Cir. 1989) ("[T]he court must dismiss the indictment[.]"); United States v. Jones, 887 F.2d 492, 494 (4th Cir. 1989) ([T]he Act mandat[es] dismissal of an indictment."); United States v. Johnson, 29 F.3d 940, 945 (5th Cir. 1994) ("[I]n accordance with the mandate of the statute, [the] indictment must be dismissed."); United States v. Dunbar, 357 F.3d 582, 591 (6th Cir. 2004) ("[T]he Act mandates dismissal of the indictment."), vacated on other grounds, 125 S. Ct. 1029 (2005); United States v. Koory, 20 F.3d 844, 846 (8th Cir. 1994) ("[D]ismissal is mandatory[.]"); United States v. Lewis, 349 F.3d 1116, 1120 (9th Cir. 2003) ("[T]he court must dismiss the indictment[.]"); United States v. Doran, 882 F.2d 1511, 1518 (10th Cir. 1989) ("[D]ismissal of the indictment is mandatory."); United States v. Garrett, 720 F.2d 705, 707 (D.C. Cir. 1983) ("Dismissal is mandatory.").

746 F.2d at 230; Perez-Reveles, 715 F.2d at 1353-54.

In Carey, the defendant moved to dismiss on the ground that 71 non-excluded days had elapsed. 746 F.2d at 229-30. In response, the district court entered a one-day continuance nunc pro tunc based on an "ends of justice" finding, held that any violation of the Act was "harmless," and denied the motion. Id. at 230. On appeal, the Fourth Circuit ruled, in an alternative holding, that harmless-error analysis was inapplicable. "[W]e cannot accept the district court's ... ruling that the nunc pro tunc continuance was harmless error. Congress provided in Section 3162 for dismissal of the prosecution with, or without, prejudice if the time limits prescribed by the Act are not met. As Janik points out, the government's intention to seek another indictment affords no justification for refusing to impose a sanction that Congress has mandated." Id. (citing Janik, 723 F.2d at 546).[15]

In Crane, the district court declined to dismiss the indictment under the Act, finding, inter alia, that dismissal would be "judicially inefficient." 776 F.2d at 604. Much like the Second Circuit, the court reasoned that dismissal would have been "without prejudice," the government would have reindicted the defendant, and therefore "dismissal would have been useless." Id. The Sixth Circuit unanimously reversed. It held that the district court's conclusion that dismissal would have been "useless" was not a "proper justification" for not complying with the Act's

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[15] The Fourth Circuit denied the defendant relief, however, finding that the 70-day time period, properly calculated, was not exceeded.

requirements. Id. at 606. The Sixth Circuit vacated the defendant's conviction and remanded for dismissal of the indictment with or without prejudice. Id. at 607; see also Howard, 1997 WL 705077, at *6 ("We simply have found no authority to support the proposition that actual prejudice must be shown when a district court completely fails to comply with the requirements of the Speedy Trial Act.... There is no basis for such a requirement in the text or legislative history of the Speedy Trial Act, and we decline to add such a requirement.").

The Ninth Circuit has likewise held that the "shall be dismissed" language of Section 3162(a)(2) is mandatory, even if no prejudice is shown. Perez-Reveles, 715 F.2d at 1353-54. The court recognized that its role was not to question the "wisdom or peril" of the Act's strict requirements, but to enforce them:

> Whatever debate might still be open as to the wisdom or peril of imposing rigid time requirements, Congress seems carefully to have determined that a comprehensive plan for facilitating shorter pre-trial delays would promote the interests of the public, the individual, and the ends of justice. To accomplish these aims, sanctions were provided in § 3162.

Id. at 1353 (quoting United States v. Antonio, 705 F.2d 1483, 1485 (9th Cir. 1983)). The court held that the conviction could not remain in place even if, on remand, the district court were to determine that the case should be dismissed without prejudice. "A determination of dismissal without prejudice does not permit the reinstatement of the judgment and sentence ... because the applicable statutory provision in this instance [Section 3162(a)(2)] requires the dismissal of the indictment, the

foundational pleading for the criminal trial." 715 F.2d at 1353. "Therefore, if the district court should determine that the case is to be dismissed without prejudice, the judgment cannot be reinstated, but the effect of that order would be to permit retrial only after reindictment of the defendant." Id. at 1354.

In contrast, the Second and Seventh Circuits hold that Section 3162(a)(2) requires dismissal only where a violation of the 70-day period caused prejudice or affected a "substantial right" beyond the right to be tried within 70 days. A. 19; Smith. The Second Circuit first applied harmless-error analysis to the Act in Gambino. In that case, which involved a "captain" of "one of the most notorious organized crime families in the United States," 59 F.3d at 356, the Circuit held that the defendant had been tried outside the Act's 70-day period. The Circuit also held that the district court erred by declining to dismiss the indictment on the ground that any dismissal would have been "without prejudice." The Circuit held that dismissal of the indictment was "mandatory" even if that remedy might seem a "purposeless formalism" in a particular case. Id. The Circuit held that dismissal was "the sanction Congress saw fit to impose, and it was therefore the district court's duty to impose it." Id. at 363. Contradicting its own reasoning, however, the Second Circuit then affirmed Gambino's conviction on the ground that the speedy trial violation was "harmless" in his particular case. Id.

In this case, the Second Circuit expanded Gambino's harmless-error holding into a general rule: Harmless-error analysis always

applies to a violation of the Act's 70-day time period. A. 18. In effect, the Second Circuit interprets the statutory directive, "the indictment shall be dismissed," to mean that the indictment shall not be dismissed, even without prejudice, unless the defendant has been harmed by the delay.

The Seventh Circuit recently followed Zedner's harmless-error holding. In Smith, the Act's 70-day period was exceeded by a few days or by a month, "depending on one's perspective." 415 F.3d 682 (Westlaw print-out at p. 4).[16] The court nevertheless affirmed the defendant's conviction on harmless-error grounds because the defendant could not show prejudice at trial from this "minor delay:"

> Even though district courts have an unconditional obligation to enforce the Speedy Trial Act, if the district court errs and the case proceeds to judgment, then the harmless error rule applies at the appellate level.

Id. (citing Zedner, 401 F.3d at 47; Neder v. United States, 527 U.S. 1 (1999); 28 U.S.C. § 2111). While the Seventh Circuit interpreted Zedner's harmless-error rule to apply only at the "appellate level," the Second Circuit explicitly relied on the harmless-error provisions of Fed. R. Crim. P. 52(a), a rule that applies in both the district courts and the courts of appeals. See Fed. R. Crim. P. 1(a).

In short, the circuits are deeply divided over the harmless-error issue. Because the Speedy Trial Act applies automatically to every federal prosecution in the nation, see Hill, 528 U.S. at 117

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[16] Only the Westlaw citations are currently available.

n.2, and because the mandatory dismissal provisions are the central mechanism for enforcing the Act, the uncertainty generated by this conflict is intolerable and should be resolved.[17]

B. The Second Circuit's decision to apply harmless-error analysis violates the text of the Act and conflicts with this Court's decisions in Taylor and Bozeman.

This Court should also grant review because the Second Circuit's decision to apply harmless-error analysis violates the text, structure, and purposes of the Act, as analyzed in Taylor. The Second Circuit's decision is also inconsistent with this Court's interpretation of similar speedy trial language in Bozeman.

The language of Section 3162(a)(2) is clear. It provides, in pertinent part:

> **§ 3162. Sanctions**
>
> **(a)** ...
>
> **(2)** If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment **shall be dismissed** on motion of the defendant. [...] In determinating whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the

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[17] The danger of the Second Circuit's broad waiver and harmless-error principles is that courts will be tempted to apply them routinely to forgive violations of the Act's 70-day time limit. The temptation is already proving irresistible. See, e.g., Smith; United States v. Friemann, 2005 WL 1427503, at *1-*2, No. 04-5506-CR (2d Cir. Jun. 15, 2005) (unpublished) (holding that any speed trial violation was waived or was harmless) (citing Zedner); United States v. Goykhman, 2005 WL 714124, at *1, No. 04-3278-CR (2d Cir. Mar. 29, 2005) (unpublished) ("Assuming, arguendo, that there was a Speedy Trial Act violation, it was harmless.") (citing Zedner).

administration of justice.

18 U.S.C. § 3162(a)(2) (emphasis added). As this Court has recognized, "the statute admits no ambiguity in its requirement that when ... a violation [of the 70-day period] has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'" Taylor, 487 U.S. at 332 (quoting 18 U.S.C. § 3162(a)(2)); see also id. at 341 n.12 ("If the Government fails to try the defendant within the statutory time frame, the defendant is entitled to dismissal."). The Court added, "As is plain from th[e] language, courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy[.]" Id. It follows, a fortiori, that courts cannot simply decide to impose no remedy at all.

Given the unambiguous mandate of Section 3162(a), a court may not ignore a violation of the 70-day time limit, as the Second Circuit did here, merely because the court believes that the case was tried to "satisfactory conclusion" and that dismissal would be "illogical" or cause "expense" and "inefficiency." A. 19. As this Court has declared, "It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition of the text is not absurd -- is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (internal quotation marks and citations omitted)); see also Richards v. United States, 369 U.S. 1, 10 (1962) (courts "are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the

process of construction.").

The thirty-year history of the Speedy Trial Act, and this Court's long history of interpreting its carefully structured dismissal provisions as written, see Taylor, refute the Second Circuit's notion that there is something so patently "absurd," "perverse," or "illogical" about Section 3162(a)(2) to justify disregarding its plain text. The Second Circuit noted that a dismissal without prejudice can cause more delay in a case. But Congress did not intend for a dismissal without prejudice to somehow cure or erase delay in any given case. Rather, it made the deliberate policy judgment that mandatory dismissal, with or without prejudice, was necessary to deter violations of the 70-day time limit prophylactically. E.g., Willis, 958 F.2d at 64 ("Congress's intent in providing for the dismissal sanction was 'to serve as a deterrent for the failure of the United States Attorney or the court to comply with the Act.'") (citation omitted).

Viewed from this deterrent standpoint, the Act's mandatory dismissal provisions make perfect sense. As this Court recognized in Taylor, "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely." 487 U.S. at 342; see also Janik, 546 F.2d at 546 (dismissal without prejudice serves a deterrent purpose

because "the grand jury may refuse to reindict and since even if it does the defendant may be acquitted").

The Second Circuit also noted the potential costs and consequences of mandatory dismissal. But these costs and consequences -- and the certainty that they will follow if the Act's time limits are violated -- are precisely what give the dismissal sanction its deterrent effect.

The Second Circuit's decision also violates the careful structure of Section 3162(a)(2), as analyzed in Taylor. In that case, this Court held that, while prejudice to the defendant is a factor to be considered in deciding what type of dismissal must be ordered, the absence of prejudice is not "dispositive" even on that issue. 487 U.S. at 341. The Second Circuit, however, erroneously makes the prejudice factor dispositive by requiring a showing of harm before any dismissal may be ordered. If such a showing were required, Congress would not have explicitly permitted a dismissal without prejudice. The Second Circuit, however, reads this remedy out of the Act entirely.

The Second Circuit's decision also conflicts with this Court's unanimous decision in Bozeman. Bozeman held that there is no place for harmless-error analysis when a speedy trial statute contains "absolute language" mandating dismissal of the indictment as the appropriate remedy. 533 U.S. at 153-54. Bozeman, like Hill, concerned the IAD, 18 U.S.C. App. § 2 (1970), an interstate compact that creates uniform procedures for lodging and executing a detainer. 533 U.S. at 148. The IAD contains an "anti-shuttling"

provision that provides, in pertinent part, that a State that obtains a prisoner for purposes of trial must try him within 120 days of his arrival and that, if it returns him to his "original place of imprisonment" prior to that trial, the "indictment ... shall not be of any further force or effect, and **the court shall enter an order dismissing the same with prejudice**." 18 U.S.C. App. 2, § 2, Article IV(e) (emphasis added).

Bozeman held that this "absolute language" required dismissal of the indictment -- "with prejudice" -- even though the prisoner's initial imprisonment had been interrupted only for a single day. 533 U.S. at 153-54. The Court rejected the State of Alabama's position, echoed by the Second Circuit here, that a violation could be overlooked on policy grounds as "de minimis, technical, or harmless." Id. at 156. The Court held, "The word 'shall' is ordinarily 'the language of command.'" Id. at 153 (citations omitted). The Court added: "The cases Alabama cites as supporting 'harmless error' construction involved statutes that lacked this absolute language." Bozeman, 533 U.S. at 153-54 (citing, inter alia, United States v. Montalvo-Murillo, 495 U.S. 711, 716-17 (1990) (Bail Reform Act "is silent on the issue of a remedy for violations of its time limits")).

Bozeman thus demonstrates that the Second Circuit's harmless-error rule cannot stand. The IAD and the Speedy Trial Act both provide time frames in which the government must bring criminal defendants to trial. Although the two statutes differ with respect to waiver, see Hill, 528 U.S. at 117 n.2, they contain very similar

language with respect to remedy. Like the mandatory dismissal provisions of the IAD at issue in Bozeman, the pertinent language of the Speedy Trial Act is "absolute." It says that the "indictment shall be dismissed." 18 U.S.C. § 3162(a)(2). The harmless-error cases cited by the Second Circuit, in contrast, all concerned statutory provisions that lack this absolute language, as the court itself acknowledged. A. 18.

The Second Circuit also erroneously relied upon the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). Nothing in these provisions supplants the Act's specific language mandating dismissal. Indeed, the United States Solicitor General specifically cited Section 2111 and Rule 52(a) to this Court in Bozeman to support the application of harmless-error analysis in that case, but not a single Justice was persuaded. See Brief of the United States as Amicus Curiae in Support of Petitioner at 23, Bozeman (No. 00-492). Rule 52(a) and Section 2111, provisions of general application, do not permit a court to disregard the specific remedy mandated by the Speedy Trial Act itself. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific [provision] governs the general.").

The Second Circuit's holding also undermines the central legislative compromise embodied in Section 3162(a)(2). See Taylor, 487 U.S. at 333-36. Early drafts of the Act required dismissal only "with prejudice." H.R. 7107, 92d Cong., 1st Sess. (1971); S. 895, 92d Cong., 1st Sess. (1971). This inflexible sanction

generated much controversy in Congress, with proponents arguing that an absolute bar to re-prosecution was essential to ensure compliance with the Act's time periods and opponents arguing that this sanction was too harsh and unfair. Taylor, 487 U.S. at 334 (citations omitted). "Eventually, in order to obtain passage of the Act, a compromise was reached that incorporated, through amendments on the floor of the House of Representatives, the language that eventually became § 3162(a)(2)." Id. at 334-35 (citation omitted). The mandatory dismissal sanction was retained, but Congress granted courts flexibility to dismiss "without prejudice" for minor violations where, for example, the defendant was not harmed by the delay. The Second Circuit, however, by allowing no dismissal at all unless prejudice has been shown, violated its duty to "ensure that the purposes of the Act and the legislative compromise it reflects are given effect." Id. at 337.

In summary, the Speedy Trial Act as construed by the Second Circuit bears little resemblance to the "plain-speaking" Act passed by Congress and signed by President Ford. Blackwell, 12 F.3d at 46. By injecting amorphous rules of implied waiver and harmless error into the Act, the court has eviscerated the statute's text and structure, weakened its effectiveness, and undermined its central purpose of ensuring the prompt disposition of criminal cases. As the Justice Department advised Congress during the 1971 Senate hearings:

> [I]t may well be ... that the whole system of federal criminal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors,

> defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Prepared Statement of Assistant Attorney General William H. Rehnquist, Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. at 107 (1971) (cited in Partridge, supra, at 17).

Accordingly, this Court should review the Second Circuit's broad rulings on the two issues presented. Those rulings, which extend far beyond the facts of this particular case, exacerbate a conflict among the courts of appeals, contravene the Act's text and purposes, and disregard this Court's precedents. This Court's intervention is necessary to ensure that the Act is enforced consistently across the country in accordance with its plain terms.

Conclusion

The writ of certiorari should be granted.

Dated: New York, New York
August 22, 2005

Respectfully submitted,

Edward S. Zas

Counsel of Record

THE LEGAL AID SOCIETY
FEDERAL DEFENDER DIVISION
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742

Attorney for Petitioner
Jacob Zedner

APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

Page

Second Circuit's order denying rehearing and rehearing en banc, dated May 24, 2005 . . . . . A 01

Second Circuit's opinion, dated March 8, 2005 . . . . . A 02

Judgment of conviction, dated January 23, 2004 . . . . . A 31

District Court's memorandum and order denying defendant's motion to dismiss on speedy trial grounds, dated March 21, 2001 . . . . . A 36

Relevant Statutory Provisions and Rules . . . . . A 52

- The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2005) . . . . . A 52

- 28 U.S.C. § 2111 (West 2005) . . . . . A 62

- Fed. R. Crim. P. 52(a) (West 2005) . . . . . A 63

[redacted]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24 day of May two thousand five.

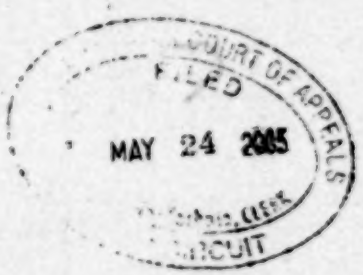
United States of America,

Appellee,

v. Docket # 04-0821

Jacob Zedner,

Defendant-Appellant.



A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jacob Zedner. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: Tracy W. Young
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: April 28, 2004 Decided: March 8, 2005
Errata Filed: March 15, 2005
2nd Errata Filed: March 23, 2005)

Docket No. 04-0821-cr

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UNITED STATES OF AMERICA,

Appellee,

-v.-

JACOB ZEDNER,

Defendant-Appellant.

----------X

Before: LEVAL and RAGGI, *Circuit Judges*, and STEIN, *District Judge*.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) convicting Defendant-Appellant Jacob Zedner of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and sentencing him to 63 months' imprisonment. The Court of Appeals (Leval, *J.*) holds that (1) any Speedy Trial Act error was harmless; (2) Speedy Trial Clause of the Constitution was not violated; (3) district court did not abuse its discretion in admitting evidence of other bad acts; (4) the conscious avoidance charge did not constitute plain error; and (5) substantial risk existed that district court misapprehended

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* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

its authority to depart downward. Conviction AFFIRMED. Sentence VACATED and REMANDED.

Stephen C. King, Assistant United States Attorney for the Eastern District of New York (Roslynn R. Mauskopf, United States Attorney, Emily Berger, Assistant United States Attorney, on brief), Brooklyn, NY, for *Appellee*.

Edward S. Zas, The Legal Aid Society, Federal Defender Division, Appeals Bureau, New York, NY, for *Defendant-Appellant*.

LEVAL, *Circuit Judge*:

Jacob Zedner appeals from his conviction after a jury trial in the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) on six counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344. Zedner claims, *inter alia*, that (1) lapses of time between the indictment and the start of trial violated his statutory and constitutional rights to a speedy trial; (2) the district court abused its discretion when it admitted evidence of his other bad acts; (3) the district court charged the jury incorrectly on conscious avoidance; (4) the court erred in the calculation of intended loss under U.S.S.G. § 2F1.1; (5) the district court misapprehended its authority to depart downward for diminished mental capacity and the loss amount's overstatement of the seriousness of the offense; and (6) the court erred in following the United States Sentencing Guidelines, which unconstitutionally deprive the defendant of the right to a jury trial. We reject contentions (1) through (4); we agree with defendant's contention (5), which requires resentencing and moots contention (6).

BACKGROUND

In March 1996, Jacob Zedner approached a number of financial institutions to open an

account using a counterfeit $10 million bond, ostensibly issued by the non-existent "Ministry of Finance of U.S.A." The bond contained numerous spelling mistakes and other errors.

The institutions uniformly refused to open an account for Zedner. One called the United States Secret Service, which arrested Zedner on March 12, 1996. A consensual search of Zedner's briefcase revealed three additional counterfeit bonds, each in the amount of $10 million, which, like the one he attempted to negotiate, were replete with mistakes.[1] The grand jury indicted Zedner on April 4, 1996 on various counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and one count of knowingly possessing counterfeit bonds in violation of 18 U.S.C. § 472.

At the first status conference on June 7, 1996, Zedner's then-attorney failed to appear, and the district court entered an order excluding the delay until the next conference on June 21, 1996, under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. At the second status conference, Zedner failed to appear, and the proceedings were again delayed until June 26, 1996. On June 26, the court entered an order excluding delay from June 26 through September 6, 1996, by reason of the complexity of the case. On September 6, the case was again adjourned, and the court excluded the delay until November 8, 1996.

On November 8, Zedner requested an adjournment of the case through the end of January. Because the court had lengthy trials pending, the judge expressed concern that Zedner might attempt to invoke speedy trial rights at an inconvenient time and insisted on a "waiver for all

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[1] Some of the bonds referred to the United States as the "Onited States" and "Thunted States," misspelled Philadelphia as "Dhtladelphia," misspelled Chicago as "Cgicago," referred to the month August as "Augit" and "Auouit," misspelled the word dollar, and claimed to have a duration of "forevev."

time" as a condition of granting the adjournment Zedner requested. The court advised Zedner of his rights, and Zedner executed a written waiver. The district court then entered an order of adjournment to January 31, 1997. Presumably because Zedner had signed a waiver of rights under the Speedy Trial Act "for all time," the judge entered no more orders of exclusion for the duration of the case.

On January 31, 1997, the government answered ready for trial, but Zedner's counsel requested another delay. The district court granted the request and scheduled jury selection for May 5. On May 2, Zedner's counsel, James Hagney, Esq., requested to be relieved on the ground that Zedner wished to assert a defense at trial that counsel believed not to have a "basis in law or fact," namely that the bonds were genuine. The court initially denied Hagney's motion but asked a representative of the Federal Defender Division of the Legal Aid Society to serve as advisory counsel. After Zedner's subsequent completion of a financial affidavit, the court relieved Mr. Hagney and appointed the Federal Defender Division of the Legal Aid Society as Zedner's counsel.

At the May 2 hearing, the court asked Zedner whether he would be willing to submit to a psychiatric examination. With Zedner's consent, the government arranged for an examination, and the court postponed the trial date while awaiting the psychiatrist's report. The psychiatrist issued her report on August 5, 1997, concluding that Zedner was competent to stand trial.

At a status conference on September 8, 1997, Zedner complained about his new attorney and asked to represent himself without an attorney. The court authorized Zedner to proceed *pro se* with the Federal Defender Division of the Legal Aid Society serving in an advisory capacity. Zedner then sought to serve subpoenas on numerous high government officials including

President Clinton, Federal Reserve Chairman Alan Greenspan, Attorney General Janet Reno, and Secretary of State Madeleine Albright. While a magistrate judge was considering various motions to quash Zedner's subpoenas, Zedner moved to dismiss the indictment on the grounds that the government had violated his civil rights and that the agents who investigated him were guilty of treason.

At the status conference on December 17, 1997, the court once again scheduled jury selection, for February 17, 1998. However, on January 30, 1998, Zedner asked the court to adjourn the trial date to allow him to serve additional subpoenas on "The Treasury Department of Treasury International Corporation" and other nonexistent entities. Over the next eight months, the court granted many motions to quash subpoenas while Zedner continued to file motions and request subpoenas for parties unconnected to his case. On October 8, 1998, the court scheduled jury selection for October 14.

The morning the trial was scheduled to begin the court consulted with counsel in chambers while a jury panel waited. The court expressed concern that Zedner was mentally ill. The government disagreed, but moved for a psychiatric examination under 18 U.S.C. § 4241(a) in order to allay the court's concerns. The court dismissed the jury panel and inquired into Zedner's competency, concluding that Zedner was not competent to stand trial. Several days later the court ordered Zedner committed to the custody of the Attorney General for hospitalization and treatment pursuant to 18 U.S.C. § 4241(d). Zedner filed an interlocutory appeal, and in *United States v. Zedner* (*Zedner I*), 193 F.3d 562 (2d Cir. 1999) (per curiam), we vacated the order of commitment and remanded for a new competency hearing on the ground that a competency hearing of a person whose competence is reasonably doubted should not proceed

with that person acting as his own attorney.

The district court convened a status conference on April 4, 2000, but only the government appeared. At the rescheduled status conference held on April 27, 2000, the government and Tracey Gaffey, Esq. of the Federal Defender Division of the Legal Aid Society, now acting on Zedner's behalf, jointly requested that the court schedule the new competency hearing for July 10, 2000. The court complied, and the hearing was held as scheduled in July. At the close of the hearing, the court invited the parties to submit additional briefs on the issue of Zedner's competency. Ms. Gaffey submitted a brief on August 4 arguing that Zedner was competent to stand trial and requesting that the court schedule the case for trial "as soon as possible." The government filed a letter brief on August 11, 2000 taking the position that Zedner was incompetent to stand trial. Zedner filed a *pro se* brief on August 23, 2000.

In November, however, while the competency motion was on submission, Ms. Gaffey became unavailable to try the case for medical reasons relating to her pregnancy. Assistant U.S. Attorney Leonard Lato explained in a later affidavit that he received a phone call in late November 2000 from the Federal Defender Division of the Legal Aid Society informing him that "Ms. Gaffey would be out of the office for a few weeks for reasons related to her pregnancy." Lato was subsequently advised that "Ms. Gaffey was unlikely to return until some time after Ms. Gaffey gave birth." A month later, Lato discussed Zedner's case with Gaffey and the two agreed that the case did not require immediate attention.[2] On March 7, 2001, Zedner moved to dismiss the indictment with prejudice under the Speedy Trial Act and the Speedy Trial Clause of the

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[2] Although the record apparently is silent on the subject, we can confidently assume that the trial court was notified of the fact of Ms. Gaffey's prolonged unavailability.

Sixth Amendment. The court issued a memorandum order on March 21, 2001 denying Zedner's motions on the grounds that the case was complex and Zedner had waived his speedy trial rights "for all time."

Returning to the issue that was submitted to the court by the August briefing, the court found Zedner incompetent to stand trial and ordered him to surrender to the Attorney General for commitment. Zedner appealed, and we affirmed. *United States v. Zedner* (*Zedner II*), 29 Fed. Appx. 711 (2d Cir. Feb. 21, 2002).

In May 2002, Zedner entered a federal medical facility for psychological evaluation. Near the end of his commitment, Zedner moved to extend his stay by 90 days to allow for a more comprehensive evaluation. On August 27, 2002, Zedner was released. The institution's report found that Zedner was delusional but competent to stand trial. The district court accepted the report and scheduled jury selection to begin on April 7, 2003.

The trial focused primarily on Zedner's state of mind with respect to six efforts to open a bank account using a bogus bond. The government called representatives from the various financial institutions Zedner had approached, as well as a Secret Service agent, who testified that at the time of his arrest Zedner possessed credit cards and calling cards in at least five different names. Representatives of Citibank and American Express testified that the cards had uncollectible balances exceeding $13,000. In an effort to prove absence of fraudulent intent, the defense called as its only witness a psychologist who testified that Zedner suffered from a delusional disorder and genuinely believed the bonds he possessed were authentic. The government called two rebuttal witnesses. Both witnesses told similar stories of contacting Zedner in 1988 seeking assistance in the refinancing of a mortgage on her home. In each

instance, Zedner transferred title to the home into his own name. Each witness testified that she had been obligated to sue to recover title to her house.

The jury convicted Zedner on six counts of fraud, each representing a separate attempt to open a financial account funded by a phony bond. In the presentence report, the Probation Department, using the 1995 version of the Guidelines Manual, which was in effect at the time of Zedner's crime, determined that his base offense level was 6. It recommended adding two offense levels for more than minimal planning pursuant to U.S.S.G. § 2F1.1(b)(2)(A) and seventeen levels pursuant to U.S.S.G. § 2F1.1(b)(1)(R) based on a total intended loss of $40,013,285.19.

Zedner challenged the loss calculation. He also moved for a downward departure on grounds of diminished mental capacity and that the aggregate intended loss overstated the seriousness of his offense.

The court denied all of Zedner's motions. With respect to intended loss, the court set the level at approximately $60 million based on Zedner's six attempts to pass off a bond with a face value of $10 million. The court declined to grant a downward departure, explaining on the issue of diminished capacity that the jury had rejected the argument that, by reason of his delusions, Zedner did not possess the requisite *mens rea* during the commission of his crime. The court sentenced Zedner to 63 months in prison, with credit for time served during his competency exam, and 5 years of supervised release. It also imposed a mandatory special assessment of $300.

Zedner then brought this appeal.

DISCUSSION

I. Speedy Trial Act

Zedner claims that his rights under the Speedy Trial Act were violated based on two periods of delay: (1) January 31, 1997 until May 2, 1997, during which the district court entered no order of exclusion while postponing trial at Zedner's request; and (2) August 11, 2000 until March 7, 2001, a period in which Zedner's competence to stand trial was in question and Zedner's attorney became unavailable because of pregnancy complications. As to both periods, we reject Zedner's contentions.

The Speedy Trial Act provides that the trial of a defendant must commence within seventy days from the date he is indicted or brought before a judicial officer, whichever occurs later, 18 U.S.C. § 3161(c)(1), failing which § 3162(a)(2) directs dismissal of the indictment. In counting the passage of seventy days, however, the district court may exclude certain periods of time as specified in § 3161(h). For example, the speedy trial calculation does not include "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant," § 3161(h)(1)(A); "delay resulting from any interlocutory appeal," § 3161(h)(1)(E); certain delay related to pretrial motions, § 3161(h)(1)(F); reasonable delays up to 30 days while any question is under advisement, § 3161(h)(1)(J); "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4); or any period of delay for which the district court finds on the record that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," § 3161(h)(8). Although seven years passed between Zedner's indictment and the start of his trial, most of the delay falls squarely within one of these statutory

grounds for exclusion.

The exclusions contained in §§ 3161(h)(1)-(7) are, for the most part, self-executing, but § 3161(h)(8) provides that no exclusion based on the "ends of justice" shall be valid "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." The district court followed this procedure throughout 1996, entering several orders of exclusion based on the failure of Zedner's counsel to appear, the failure of Zedner to appear, and the complexity of the case. After several continuances, however, the court grew concerned that Zedner might invoke the delays he caused or requested as the basis for a motion to dismiss the indictment under the Speedy Trial Act. When counsel for Zedner requested a three-month adjournment of the case in November 1996, the district court responded, "I think if I'm going to give you that long an adjournment, I will have to take a [speedy trial] waiver for all time. . . . I have some big cases and if I get bogged down with them you may be a long while before you get a trial." The defendant agreed to the request. His counsel assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." Thereafter, the court spoke directly to Zedner. It informed him, "I'm prepared to start your trial right away," and warned, "I have some fairly big cases pending in my docket, one of which is set to take eight months for trial. If you get locked in, if that starts before you start, you may have to wait until that is done." Zedner then executed both an oral and written waiver of his speedy trial rights "for all time." Thereafter, the district court did not enter any orders of exclusion based on its assumption that the waiver "for all time" removed all speedy trial issues from the case.

A. Period from January 31, 1997 to May 2, 1997

Zedner alleges that the lapse of over 90 days between January 31, 1997 to May 2, 1997 (a period which exceeds the seventy days allowed by the Act) requires dismissal of the indictment. In denying Zedner's motion under the Speedy Trial Act, the district court relied on Zedner's waiver of his speedy trial rights "for all time." However, in *United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995), we ruled, like other circuits, that a defendant's waiver of rights under the Speedy Trial Act may be ineffective. *Id.* at 360. We observed that the public has a strong and independent interest in the expeditious prosecution of criminal cases. That public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver.

At the same time, however, in an effort to reach a reasonable balance between the interests of the public and of the defendant, we recognized in dictum an exception to the non-waiver rule "when defendant's conduct causes or contributes to a period of delay." *Id.* Such an exception had been previously crafted by the First Circuit in *United States v. Pringle*, 751 F.2d 419, 434 (1st Cir. 1984). In *Pringle*, a defendant sought three continuances. The third motion stated that the defendants "waive their rights to a speedy trial." *Id.* at 433. The district court granted the motion and scheduled trial for two months later. *Id.* However, the trial was not held, and an additional five months passed before the filing of a motion stopped the speedy trial clock. *Id.* at 434. The record contained no explanation for the delay, and the First Circuit remanded the case to determine the cause. *Id.* at 436. It instructed the district court to exclude the five-month period from the speedy trial calculation if the district court determined on remand that the defendants' request for delay and purported waiver had induced the delay. *Id.* at 435. The First

Circuit expressed concern that a contrary ruling would reward the defendants because "[i]n essence, defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal." *Id.* at 434.

The Seventh Circuit aired similar reasoning in *United States v. Kucik*, 909 F.2d 206 (7th Cir. 1990). As an alternative holding rejecting the defendant's speedy trial claim, the court explained, expressing approval of *Pringle*, that a defendant who "actively participates in a continuance" cannot "then 'sand-bag' the court and the government by counting that time in a speedy trial motion." *Id.* at 211.

The Fifth Circuit rejected that reasoning in *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992). Willis, who was unrepresented by counsel at the time, requested additional time to prepare for trial and, at the prompting of the district court, waived his speedy trial rights. *Id.* at 62. The district court then granted an open-ended continuance until Willis indicated he was ready for trial. Willis later moved to dismiss the indictment based on the resulting period of delay. Despite earlier Fifth Circuit dictum approving of *Pringle*, *see United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989), the court expressed concern that a broad exception would swallow the non-waiver rule. It agreed that "the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous to seek dismissal under the Act." *Willis*, 958 F.2d at 64. But it concluded that a "district court is not sandbagged or otherwise misled . . . by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." *Id.* The court worried that the non-waiver rule would be "meaningless if . . . the defendant waives

his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." *Id.* It therefore charged district courts with the responsibility of ensuring that any request for a continuance, even one sought or agreed to by the defendant, fall within one of the exceptions contained in the Speedy Trial Act. *Id.*

The Fourth Circuit adopted yet another approach in *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994). The delay in *Keith* came about when the Assistant United States Attorney fell ill several days before trial was scheduled to start. *Id.* at 236. The district court granted the government's motion for a continuance in a written order that was signed by defense counsel as "[s]een and agreed." *Id.* (alteration in original). The defense attorney later reversed course and moved to dismiss the indictment on speedy trial grounds immediately before the rescheduled trial was set to begin. After concluding that the order granting the continuance failed to meet the procedural requirements of the § 3161(h)(8) "ends of justice" exception, the Fourth Circuit turned its attention to the question of whether the defendant could use the delay acquiesced to by his counsel in support of his Speedy Trial Act claim. *Id.* at 238. The Fourth Circuit expressed concern about the breadth of the rule announced in *Pringle* and *Kucik*, which "would appear to find a waiver when a defendant consents to a continuance occasioned on *any* reason, including the district judge's desire to go fishing." *Id.* at 239. At the same time, the Fourth Circuit characterized the rule in *Willis* as "too narrow." *Id.* The Fourth Circuit instead adopted a middle position, concluding that "if a defendant affirmatively consents to a motion for a continuance and the reasons for the granting of that motion as garnered from the record are sufficient to support a finding that the ends of justice would be met by granting the motion, the defendant cannot take advantage of that discrete period of time covered by the continuance in asserting a violation of

the Speedy Trial Act." *Id.* at 240.

We agree with the Fourth Circuit that the approach taken by the Fifth Circuit in *Willis* does not strike the right balance. We very much doubt that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request. In our view the public interest is not advanced either by allowing such a defendant to escape prosecution altogether, or by dismissing the indictment and reindicting with consequent wasteful reprosecution after a substantial additional delay. *But see United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983).

We need not define the exact scope of the exception to the non-waiver rule in order to decide the case before us. At the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless whether the court made an "ends of justice" finding under § 3161(h)(8).

On January 31, 1997, the government stated that it was ready to proceed to trial. Counsel for Zedner, however, indicated that he was not ready for trial and requested a continuance. The court granted the request and delayed jury selection until May 5, 1997. Given the complexity of the case and Zedner's reasonable need for additional preparations, there can be no doubt that the district court could have properly excluded this period of time based on the ends of justice. Zedner therefore cannot establish a Speedy Trial Act violation based on the grant of the delay he requested. His claim regarding January 31, 1997 to May 2, 1997 fails.[3]

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[3] Notwithstanding this ruling, district courts contemplating adjournment of trial are far better advised to make prospective "ends of justice" findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers "for all time" seems

B. Period from August 2000 to March 7, 2001

Zedner also alleges that the court's failure to start his trial between August 2000 and March 7, 2001, requires dismissal of the indictment. We reject his contention. Zedner could not have been tried in this period, for two reasons.[4]

First, as noted above, beginning in late November 2000, Zedner's counsel Ms. Gaffey became unavailable for trial by reason of complications resulting from her pregnancy. Ms. Gaffey's Federal Defender office advised the AUSA first that she would be out for a few weeks, and later that her unavailability would continue until some time after she gave birth. The court could not have started trial at a time when the defendant's lawyer would have been unavailable to participate.[5]

In addition, Zedner could not have been tried in this period because he was not competent to stand trial. The question of his competence was submitted in August 2000. The court held the matter under advisement for some time, but eventually found Zedner incompetent and ordered him committed. We affirmed that decision on appeal. *Zedner II*, 29 Fed. Appx. at 713. No court conferences were held during this time, perhaps because the court considered it useless to convene a conference knowing that Zedner's counsel would not be able to appear.

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particularly inadvisable. *See Gambino*, 59 F.3d at 359-60.

[4] We note in passing that the first thirty days after the August 23 filing of Zedner's *pro se* brief addressing his competency to stand trial clearly fall under 18 U.S.C. § 3161(h)(1)(J), which excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

[5] Of course, a district court has discretion to replace a court-appointed attorney whose unavailability will be extensive. Similarly, it may require a defendant whose retained counsel is unavailable to defend a case on the reasonable schedule established by the court to secure the services of another attorney.

It might be argued on Zedner's behalf that this time during which he was not competent may not be excluded because, so far as the record reflects, the delay did not *result from* the fact that he was incompetent. Section 3161(h)(4) excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." The argument might be made that the court's failure either to make a record that the delay resulted from the defendant's incompetence or to start trial was at least potentially a technical violation of the Act.

The question would then be whether a defendant is entitled to have his conviction voided and the indictment dismissed by reason of the court's failure to begin trial at a time when the court could not have begun trial because the defendant was incompetent, as well as because the defendant's counsel was unavailable for trial. The failure to start trial when the defendant could not have been tried was, at worst, a harmless, technical error, and, in our view, cannot justify vacating the conviction and dismissing the indictment.

Zedner argues that a violation of the Speedy Trial Act's 70-day period for bringing a defendant to trial cannot be deemed harmless, and that dismissal of the indictment is the mandatory remedy for any violation of the statute. We disagree. As explained below, recognition of the distinction between harmless error and error affecting substantial rights furthers, rather than detracts from, the purposes of the Speedy Trial Act.

While it is true that, in some speedy trial cases, we have directed dismissal of the indictment without discussing harmless error analysis, *see, e.g.*, *United States v. Kelly*, 45 F.3d 45, 48 (2d Cir. 1995) (per curiam) (remanding to district court to determine whether dismissal should be with or without prejudice); *United States v. Simmons*, 786 F.2d 479, 486 (2d Cir. 1986)

(instructing district court to dismiss indictment without prejudice); *United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985) (dismissing indictment without prejudice), we held in *Gambino* that the failure to bring the defendant to trial within 70 non-excludable days from the filing of the indictment constituted harmless error. 59 F.3d at 363. In addition, at least three circuits have required a showing of prejudice when reviewing alleged violations of the Speedy Trial Act's requirement that defendants be given at least 30 days to prepare between indictment and the start of trial. *See, e.g., United States v. Edwards*, 211 F.3d 1355, 1358 (11th Cir. 2000); *United States v. Cisneros*, 112 F.3d 1272, 1277 n.3 (5th Cir. 1997); *United States v. Grosshans*, 821 F.2d 1247, 1252-53 (6th Cir. 1987).

We acknowledge that these precedents do not necessarily resolve the question. There are differences. In *Gambino* the defendant had conceded that reindictment "would have been inevitable" following dismissal of the original indictment without prejudice. *Gambino*, 59 F.3d at 363. Furthermore, the exercise of statutory interpretation in the case of a violation of the 30-day preparation period required by § 3161(c)(2) is not precisely identical to that for violation of the 70-day requirement of § 3161(c)(1). Section 3162(a)(2) provides on its face that the "indictment . . . shall be dismissed" if the "defendant is not brought to trial within the time limit required by 3161(c)." The Speedy Trial Act does not contain a remedy expressly directed to failure to allow the defendant 30 days for preparation as required by § 3161(c)(2).

Nonetheless, we conclude that harmless error analysis is appropriate in Speedy Trial Act cases because of that statute's relationship to other governing statutes and rules (as well as because Congress could not reasonably have intended the absurd results that otherwise follow). Section 2111 of Title 28, United States Code, instructs appellate courts to "give judgment . . .

without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly instructs courts to disregard "[a]ny error, defect, irregularity, or variance that does not affect substantial rights." The Speedy Trial Act does not indicate that these normative principles should be disregarded, and we can see no reason why they should be.

There are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful. Delay unquestionably can be prejudicial to an accused defendant. It can result in faded or lost memories, or even the death or other unavailability of witnesses. Likewise, in some circumstances, delay can be prejudicial to the public interest protected by the Act. On the other hand, failure to consider the harmlessness of certain errors under the Speedy Trial Act can result in perverse outcomes, including allowing serious crimes to go unpunished, and causing the objective of the Act to expedite the administration of criminal justice to be undermined. A case tried to a satisfactory conclusion a few days later than the Act specifies, without substantial adverse effect on anyone, can require costly retrial a year or more later, after appeal, dismissal of the indictment, and reindictment, in a manner causing vast expense, inefficiency, unfairness, and unjustifiable delay in the administration of criminal justice. We see no reason to believe Congress intended such illogical results.

Absent a clear indication to the contrary, we believe the Speedy Trial Act should be interpreted, like other laws, to operate consistently with the overriding prescription of 28 U.S.C. § 2111 that courts should disregard defects that do not affect substantial rights.

Needless to say, the availability of harmless error analysis does not trivialize the Act's concerns. Furthermore, as we cautioned in *Gambino*, "our holding is not a signal that affirmance

of a district court's failure to dismiss an indictment on harmless error grounds . . . will routinely follow. On the contrary, since we review the question of prejudice *de novo*, nondismissal in the event of a violation will always risk nullifying an entire trial." *Gambino*, 59 F.3d at 363.

The question we face is whether Zedner is entitled to have his conviction vacated and the indictment dismissed by reason of the court's failure to start trial during a period when trial could not have been conducted – because Zedner was not competent to stand trial and Zedner's counsel was not available. Zedner has failed to put forth any convincing argument that this delay prejudiced him at his trial.[6] We conclude without hesitation that the error, if any, was harmless and that Zedner is not entitled to Speedy Trial Act relief on that account.

II. Speedy Trial Clause

In addition to his claims under the Speedy Trial Act, Zedner also argues that his rights under the Speedy Trial Clause of the Sixth Amendment have been violated by the seven-year delay between indictment and trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court identified four factors relevant to determining whether the Speedy Trial Clause of the Sixth Amendment has been violated: (1) length of the delay; (2) the reason for the delay; (3) whether and how the defendant asserted the speedy trial right; and, (4) prejudice to the defendant. *Id.* at 530. The Court cautioned that "these factors have no talismanic qualities; courts must still

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[6] Zedner complains that he was prejudiced when the government impeached the psychologist who testified as the only witness on Zedner's behalf on the ground he had not examined Zedner until years after Zedner committed his crime. The problem with this argument is that the psychiatrist examined Zedner on May 5, 2000, three months *before* the period of delay of which Zedner complains, and therefore any prejudice cannot be attributed to the district court's failure to rule expeditiously in August 2000.

engage in a difficult and sensitive balancing process." *Id.* at 533. We conclude that there was no violation of the Speedy Trial Clause of the Sixth Amendment.

It is true that the first factor, length of the delay, favors Zedner, *see United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979) (54-month delay "is unquestionably substantial"), but the second factor, the reasons for the delay, weighs heavily against him. Most of the delay between indictment and trial was caused by Zedner's own requests for delay, his attempts to subpoena prominent persons and fictitious entities, the need to determine his competency to stand trial, Zedner's incompetency for a time, and two interlocutory appeals taken by him. *See United States v. Vasquez*, 918 F.2d 329, 338 (2d Cir. 1990) (citing defendant's various pretrial motions as reason weighing against defendant); *see also United States v. Mills*, 434 F.2d 266, 271 (8th Cir. 1970) (holding "that delays encountered in bringing a defendant to trial who claims to be incompetent or who is temporarily incompetent ordinarily do not infringe upon his Sixth Amendment right to a speedy trial," and citing, *inter alia*, *United States v. Davis*, 365 F.2d 251 (5th Cir. 1966); *Johnson v. United States*, 333 F.2d 371, 374 (10th Cir. 1964)).

The third factor, whether and how the defendant asserted the speedy trial right, also weighs against Zedner. For several years, Zedner repeatedly requested continuances. His request to be tried "as soon as possible" did not come until August 2000, nearly four-and-a-half years after his indictment. *See United States v. Jones*, 91 F.3d 5, 8-9 (2d Cir. 1996) (failure to assert right for four months after indictment weighs against defendant).

The fourth and final factor, prejudice to the defendant, also weighs against Zedner. Prejudice "should be assessed in the light of the interests . . . the speedy trial right was designed to protect. . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and

concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. Of these interests, "the most serious is the last." *Id.* Zedner was not incarcerated prior to trial and his bail conditions were not particularly onerous. He undoubtedly experienced anxiety, but the record contains no indication that the anxiety was acute. There is no indication that Zedner's ability to mount an effective defense was seriously impaired. Indeed, much of the pretrial delay resulted from the wide latitude the district court granted Zedner to prepare his defense.

Balancing the four factors identified in *Barker*, we conclude that Zedner's Sixth Amendment right to a speedy trial was not violated. The gap between indictment and trial was long, but the major part of the delay resulted from his requests for delay and serious problems concerning his competency to be tried.

III. Rule 404(b) Evidence

Zedner claims the district court abused its discretion by admitting testimony of two rebuttal witnesses to the effect that Zedner committed frauds in 1988. The first witness testified that, when she sought Zedner's help to refinance her mortgage, he transferred the deed to her home into his own name. She had to file a lawsuit to regain title. The second witness also approached Zedner for help refinancing her mortgage. She consented to a dummy sale of her house to Zedner with the understanding that he would refinance the house in his own name to overcome her bad credit rating and then return the house to her. When Zedner asserted full ownership, the witness sued to recover title.

Federal Rule of Evidence 404(b) provides that prior act evidence "is not admissible to

prove the character of a person in order to show action in conformity therewith," but "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court considers four factors to determine whether evidence was properly admitted under Rule 404(b): "whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004) (per curiam). This evidence of fraud was offered for a proper purpose and was relevant. Zedner based his defense on the claim that he was delusional and lacked criminal intent because he did not know the bonds were counterfeit. Testimony about his other fraudulent acts tended to prove Zedner's financial sophistication, his ability to execute complex schemes, and his ability to form intent to defraud. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). Although admission of other bad act evidence runs the risk that the jury will punish the defendant for the other actions rather than the charged offense, the probative value of the evidence outweighed any prejudice. Moreover, the district court reduced any risk of unfair prejudice with a carefully worded limiting instruction. Accordingly, we conclude that the district court did not err, much less abuse its discretion, when it admitted this evidence of fraud.

IV. Conscious Avoidance

Zedner contends that the district court erroneously instructed the jury on conscious avoidance. He challenges both the decision to give the instruction and the content of the instruction. We conclude that an appropriate factual basis existed to give the conscious

avoidance charge. Although the precise charge given was not ideal, no objection was made to its specific terms and its deficiencies were not so dire as to constitute plain error.

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt 'that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)). Zedner concedes that the first prong has been met because he denied knowing that the bonds were counterfeit. He contends, however, that the second prong was not met because there was an insufficient factual basis for the jury to conclude that he deliberately chose not to inquire into whether the bonds were genuine.

Zedner relies on two main arguments. First, he points out that, contrary to what one would expect of a person avoiding the truth, he repeatedly took the bonds to different financial institutions in an attempt to determine their authenticity. The argument mischaracterizes the evidence. Zedner took the bonds to financial institutions attempting to use them in a fraudulent transaction. He insisted on the bonds' authenticity and told elaborate lies to cover for the bonds' obvious facial defects. Nor did he disclose his prior unsuccessful attempts to deposit the bonds with other institutions. We cannot say on this record it would have been irrational for a jury to conclude that Zedner avoided the truth about the bonds.

Second, Zedner argues that there was no adequate factual basis for giving a conscious avoidance charge because the jury could have concluded either that (1) Zedner was not delusional at all and therefore had actual knowledge that the bonds were counterfeit, or that (2)

Zedner was delusional and did not make a conscious decision to overlook the suspect nature of the bonds because he genuinely believed they were real. He is correct that jurors could have found he actually knew the bonds were counterfeit, in which case they should have convicted, or that he genuinely believed they were genuine, in which case they should have acquitted him. But the jury could also have reasonably concluded that Zedner was aware of the high probability that the bonds were counterfeit and deliberately avoided confirmation of that fact. A conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge." *Hopkins*, 53 F.3d at 542; *see also United States v. Wong*, 884 F.2d 1537, 1542 (2d Cir. 1989). We conclude that the district court made no error in its decision to instruct the jury on conscious avoidance.

We now turn to the specific language of its instruction. After the district court initially overruled Zedner's objection to giving the conscious avoid charge, the defense proposed changes to the wording of the charge. The district court accepted these changes. The defense renewed its objection to giving the charge after the jury retired, but never raised any specific objections to the content of the modified charge. Accordingly, we review the language used by the district court for plain error. *See United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988) (per curiam); *United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986).

In the course of its instruction, the district court said, "knowledge that Government's Exhibit 1 was a fictitious instrument may be inferred [from] circumstances that convince an average or other person that . . . this is the fact." Trial Tr. at 417. Zedner argues that allowing the jury to infer knowledge from circumstances that would convince "an average or other person" that the bonds were false invited the jury to convict based on negligence. *See Rodriguez*, 983

F.2d at 458 (suggesting that conscious avoidance cannot be found merely because the circumstances "'should have apprised [the defendant] of the unlawful nature of [his] conduct'" (quoting *United States v. Joyce*, 542 F.2d 158, 161 (2d Cir. 1976)). If this language stood alone, Zedner would have a strong point. However, we review a potentially erroneous instruction in "light of the jury charge as a whole." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2d Cir. 1989); *see also Jones v. United States*, 527 U.S. 373, 391 (1999) (citing cases). The problematic instruction quoted above was given in conjunction with other passages, which told the jury, "If the defendant did not knowingly . . . make material misrepresentations you must find the defendant not guilty," and that it could not convict even if the "reason that the defendant lack[ed] such knowledge . . . was careless[ness] and negligen[ce] or even foolish[ness]." Trial Tr. at 417. In addition, the court said that conscious avoidance could not satisfy the knowledge requirement, regardless of what an average person would believe in the situation, if "the facts showed that the defendant actually believed that the instrument was authentic." *Id.* Reviewing the charge as a whole, we conclude that the risk of misunderstanding was substantially diminished. We therefore cannot say any error was "so obvious and seriously prejudicial to [Zedner's] substantial rights" as to warrant relief where Zedner made no objection to the content of the charge. *United States v. Bonito*, 57 F.3d 167, 174 (2d Cir. 1995).

IV. Downward Departures

Zedner alleges that the district court mistakenly believed it lacked the authority to grant a downward departure on the basis of diminished mental capacity or his contention that the loss determination overstated the seriousness of the offense. The government responds that the

district court understood its authority to depart but chose not to exercise that authority as a matter of discretion. The decision whether to depart is committed to the sentencing court's discretion, but we remand for resentencing when we perceive a "substantial risk that the judge misapprehended the scope of his departure authority." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (internal quotation marks omitted).

The district court's comments at sentencing, although ambiguous, appear on occasion to conflate the standard for diminished mental capacity with the standard for failure to form criminal intent. As a result, the district court seemed to conclude that it could not grant a downward departure for diminished mental capacity in light of the jury verdict finding beyond a reasonable doubt that Zedner intended to defraud the various financial institutions he approached with his counterfeit bonds.

A downward departure for diminished mental capacity "may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." U.S.S.G. § 5K2.13. A finding of diminished mental capacity does not necessarily mean that a defendant lacked criminal intent. *See United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (per curiam) ("[The district court's] statement suggests that it thought of diminished capacity as a question of *mens rea* for the jury to decide at trial . . . rather than a question for the court at sentencing. But that is incorrect."). For example, a defendant might fully intend to defraud a business partner, but if the fraud itself was motivated by baseless delusions that the defendant needed the money to ransom a fictitious kidnap victim, a sentencing court might properly find that the defendant was less culpable and grant a downward departure.

If a jury verdict convicting the defendant, and thereby indicating that the defendant formed the requisite criminal intent, precluded such a departure, it would make little sense for § 5K2.13 to appear in the Guidelines, because by the time a judge considers a downward departure for diminished mental capacity, every defendant has necessarily been found, either based on his plea or trial evidence, to have acted with criminal intent. Indeed, an application note added to the Guidelines in 1998 stated, "'Significantly reduced mental capacity' means the defendant, *although convicted*, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." U.S.S.G. App. C, amend. 583 (codified at U.S.S.G. § 5K2.13, cmt. n.1) (emphasis added). Although this amendment was added after the 1995 version of the Guidelines used in this case, it merely made explicit what was already implicit in the structure of the Guidelines—a conviction does not preclude a downward departure for diminished mental capacity.

In rejecting counsel's argument for departure based on diminished mental capacity, the court said,

> You argued, I thought very successfully, to the jury, that he was suffering, if I can use that word, from a delusional complex. I think the jury might have bought it up until the last two witnesses of the people who he attempted to defraud by his machinations, and [at that] point, whatever delusional defense you had went out the window, and I'm not going to interfere with that determination by the jurors.

We cannot discern exactly what the court meant by this statement. It seems to suggest that the court believed the jury's rejection of the defendant's contention that he acted without intent to defraud precluded the court from finding diminished mental capacity that would justify

a departure. If so, that was incorrect. The defendant could have acted with criminal intent so as to be guilty of the crime, while at the same time suffering from a diminished mental capacity that would justify departure. Such a departure would in no way "interfere with" the jury's finding of guilt.

In two other respects the court may have misunderstood its sentencing discretion. Zedner's counsel argued that the loss calculation under U.S.S.G. § 2F1.1(b)(1) overstated the seriousness of his offense because the bonds were so obviously invalid that they were unlikely to fool any financial institution. The court responded that it "never saw anything in the sentencing guidelines" to support that contention. In fact, Comment 10 to the pertinent guideline expressly authorizes the argument Ms. Gaffey was making. It states, "In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted." U.S.S.G. § 2F1.1, cmt. n.10 (1995).

The court also rebuffed Ms. Gaffey's argument based on the obviously phony nature of the bonds by saying, "You argued that to the jury. They didn't buy it." That remark seems to indicate that the court believed it could not depart downward based on the obviously phony nature of the bonds because the jury had rejected Zedner's argument that he lacked a criminal state of mind on account of his delusional belief that the bonds were genuine. There is no incompatibility between a jury's finding that the defendant did not delusionally believe phony bonds were genuine and a court's conclusion that the severity of the offense was diminished by the obviously spurious nature of the bonds. *Cf. United States v. Agwu*, 5 F.3d 614, 616 (2d Cir.

1993) (per curiam) (noting that a decision not to depart pursuant to Comment 10 "is not appealable unless the refusal was based on the court's mistaken belief that it did not have the discretion to do so").

The combination of circumstances resulting from the risk that the court misconstrued its authority to depart downward and the upheaval in the federal sentencing laws resulting from the Supreme Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), convinces us that the best course is to remand for resentencing consistent with this opinion and in accordance with the dictates of *Booker*.

CONCLUSION

We have considered Zedner's remaining claims and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of conviction, but **VACATE** the sentence and **REMAND** for resentencing.

AO 245B (8/96 Rev. locally 9/97)- Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK
CENTRAL ISLIP DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: CR-96-285

vs.

JACOB ZEDNER

Defendant's Attorney: Tracey Gaffey

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) ONE, TWO, FOUR, FIVE, SIX, and SEVEN after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 USC 1344	BANK FRAUD, a Class B Felony		1, 2, 4-7

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

☐ The defendant has been found not guilty on count(s)
☒ Count(s) THREE and EIGHT were dismissed on the motion of the United States at the beginning of trial.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security Number: 122-78-0006

Date of Imposition of Sentence: 1/22/2004

Defendant's Date of Birth: August 7, 1954

Defendant's USM No.: 46534-053

THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

DATE: January 23, 2004

Defendant's Residence Address: In custody
72 Hicks Lane
Great Neck, NY

Defendant's Mailing Address: —

A TRUE COPY
ATTEST
DATED 1/26/2004
ROBERT C. HEINEMANN
CLERK
BY
DEPUTY CLERK

Defendant: JACOB ZEDNER
Case No.: CR-96-285

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY-THREE (63) MONTHS, on each count to run concurrent. The defendant is given credit for time served and for time in the custody of the Bureau of Prisons for psychiatric evaluations.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ **The defendant is remanded to the custody of the United States Marshal.**
☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at __ a.m./p.m. on __.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on ___. If the defendant is not designated within the given time frame he/she should surrender to the Marshals office in Brooklyn. If the defendant has not already done so at the time of sentence he/she should communicate with the Marshals office to obtain information regarding the procedures for voluntary surrender.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy Marshal

Defendant: JACOB ZEDNER
Case No.: CR-96-285

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

Defendant: JACOB ZEDNER
Case No.: CR-96-285

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	$300.00	$	$

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

☐ The defendant shall make restitution to the following victims in the amounts listed below:

☐ Restitution is ordered jointly and severally with:

or

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$___	$___	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

Defendant: JACOB ZEDNER
Case No.: CR-96-285

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary):

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 25

Criminal History Category: II

Imprisonment Range: 63 to 78 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 10,000 to $1,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $

☐ The court finds pursuant to 18 U.S.C.§ 3664(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

☐ Restitution is not ordered because:

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

☐ the defendant was convicted of qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i); pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii), it has been determined that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A (c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A), the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A (c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the follow reason(s):

OR

The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

35

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JACOB ZEDNER,

Defendant.

----------X

MEMORANDUM AND ORDER

96-CR-285 (TCP)

PLATT, District Judge.

Defendant's attorney, Tracey Gaffey of the Federal Defender's Office, has made a Motion to Dismiss the indictment against the defendant for failure of the Court and the Government to give the defendant a speedy trial pursuant to 18 U.S.C. § 3161, completely ignoring or otherwise overlooking the fact that early on in this complex (both medical and multiple witness) litigation, defendant with the advice and assistance of counsel, under oath, waived all of his rights in open court and in a signed writing to a speedy trial for all time (copy of waiver annexed hereto).

Defense counsel will almost certainly argue that speedy trial rights may not, under the Act, be waived, but again she completely ignores or otherwise overlooks the fact that under the Act a defendant may waive his rights to speedy

trial by inaction (i.e. by not raising the right prior to the commencement of a trial) 18 U.S.C. § 3162(a)(2), and, hence, most certainly may waive such rights by affirmative action as he has done voluntarily and under oath, with the advice of counsel, here.

Moreover, defendant, of course, made no such motion on the morning of the date on which the case was called to commence the trial on the merits and may be said to have waive by inaction at that point. 18 U.S.C. § 3162(a)(2). Prior to that date, the defendant, himself, had issued and served some 33 subpoenas on witnesses to appear for the trial on that date. Among the more illustrious of these witnesses were:

U.S. President William Jefferson Clinton
U.S. Attorney General Janet Reno
U.S. Secretary of State Madeline Albright
U.S. Senator Alphonse D'Amato
Chiang Kai-shek
U.S. Treasury Secretary Robert Rubin
U.S. Federal Reserve Chairman Alan Greenspan
National Security Advisory to the White House Andy Burger

In light of the facts then known to it, instead of selecting a jury from a panel waiting in the courthouse for that purpose, the Court, with the consent and in the presence of present counsel, conducted a competency hearing.

Among other things, the Court was aware of the fact that (i) defendant had been arrested on March 12, 1996, (ii) an indictment had been

returned and filed on April 4, 1996, charging defendant with seven counts in a scheme to defraud financial institutions and one count of knowingly possessing counterfeit bonds, (iii) defendant was maintaining that he had no knowledge of the counterfeit nature of the financial instruments in question from the date of his receipt thereof in March 1996 to October 1998 and (iv) that even when advised by a representative of the U.S. Treasury Department that they were counterfeit he accepted such advice "with reservations."

At the competency hearing, defendant identified two of the counterfeit bonds that were tendered to those institutions named in the first seven counts of the indictment. Each of these bonds were in the face amount of ten million dollars. Defendant testified that he received those bonds approximately a week before his arrest via courier from two individuals named "Eagle Chang" and "Tommy Chin" who were located in Taiwan and with whom he had spoken on the telephone, but had never met. According to the defendant, the bonds arrived in connection with an anticipated transfer by these individuals of three million dollars and a power of attorney to defendant pursuant to arrangements, that were never fully explained.

In earlier statements to Government agents, defendant said that the bonds, which showed a date of issue of 1935, were given to Chiang Kai-shek when he fled to Taiwan during the Communist takeover of mainland China

(which occurred in 1949) The bonds purportedly issued by "Ministry of Finance of the USA" contained a number of obvious deficiencies on their face such as "Onited Staes," identical serial numbers and a stated duration of "forevev." One of defendant's several explanations for the misspellings was that they represented a "secret code" used to establish the bond's legitimacy.

Attached to a number of the subpoenas and exhibits given to the Court at the hearing and on prior occasions were copies of the counterfeit notes, bonds and other instruments that defendant repeatedly claimed were authentic, but which bore such inscriptions as (i) "United States of America - THREE HUNDRED MILLION DOLLARS - [drawn on] Huau Bank 1933"; (ii) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility for the issue of US Dollra (sic) Bond to all over the world (sic) since 1935"; and a Federal Reserve Note describing itself as (iii) "Hua Qi Bank Certificate Note [on which] [y]ou can draw one hundred million U.S. dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . [signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949."

It is incomprehensible to this Court how defendant rationally might maintain lack of knowledge as to the counterfeit nature of these instruments for over two years following his arrest by government agents, his indictment by a

grand jury, the inscriptions on the instruments, and repeated statements to the contrary by government agents and other institutions.

Attached hereto and made a part hereof is a copy of the Court's written Memorandum and Order dated October 19th summarizing what happened at the competency hearing.

Defendant appealed and the Second Circuit reversed, accepting a misleading misrepresentation by another member of the Federal Defender's Office, stating that the Court had held a competency hearing and erred by allowing defendant to proceed pro se at the competency hearing without ever having determined defendant's competency to make a knowing and intelligent waiver of the right to representation by counsel. The fact is, however, that defendant was represented by counsel who immediately, prior to the hearing, advised the Court that defendant proposed to conduct the entire trial by himself (opening, cross examination, direct and summation) without the assistance of counsel. At that point, the Court insisted that the defendant must have counsel (if only in an advisory capacity) throughout the proceedings and the trial. The Court of Appeals said Ms. Tracey Gaffey did not ask or object to a single question. That is true, but she did not do so because she was obviously told by her client not to do so

Ms. Tracy Gaffey is a highly competent counsel. The defendant had repeatedly said in prior proceedings he did not want Ms. Gaffey or any other lawyer to represent him; indeed, he did not want her to be in court with him. Only by reason of this Court's insistence was she permitted to remain and to represent him as she did.

Among defendants parting words to the Court after the hearing were an admonition to the Court that defendant wanted all of the subpoena recipients, including the "illustrious ones" named above, to appear for his trial.

Nonetheless, following the Second Circuit's Opinion on October 1, 1999, the Court held a second competency hearing on July 10, 2000, at which Ms. Gaffey called Sanford L. Drob, (not a psychiatrist but) the director of psychological assessment at Bellevue Hospital and the senior psychologist at the Bellevue prison ward. Dr. Drob testified that while his tests did not indicate the presence of a mental illness or the presence of a severe psychiatric disturbance, they were "suggestive of a serious psychological disorder," that he believed that he suffered from a "delusional disorder," and that there were two types of delusions, bizarre delusions and non-bizarre delusions.

On cross examination Dr. Drob conceded that it was not necessary for him to communicate with Alan Greenspan to determine whether or not Mr. Zedner was (as he claimed to be) part of an organization that ran the Federal

Reserve Board; that it was not necessary for him to conduct an independent investigation to determine whether Mr. Zedner (as he claimed) controlled fifty million dollars in bonds; that he (Dr. Drob) had never theretofore heard or read about a person who fancied himself as the head of the Federal Reserve System; that in his mind there was no possibility whatsoever that the bonds that Mr. Zedner was talking about were legitimate and that he (Dr. Drob) was not "terribly optimistic" that Mr. Zedner could be treated for his delusions but there was a possibility that he could be helped.

The law apparently still is that a "District Court's finding will be upheld unless clearly erroneous" and "where there are two permissible views of the evidence as to competency, the Court's choice between them cannot [sic] be deemed fairly erroneous." *United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995).

This Court, of course, is neither a psychiatrist nor a psychologist, but good old fashioned "common sense" tells this Court that it is not normal.

1. To receive via courier from two individuals named Earl Chang and Tommy Chin located in Taiwan with whom one had spoken but had never met, bonds with a face amount of Ten million dollars to be followed by Three trillion dollars worth of bonds and a power of attorney.

2. That legitimate bonds would show that a date of issue of 1935 which were issued by the "Ministry of Finance of USA" and contained obvious deficiencies on their face such as "Onited Staes," identical serial numbers with a stated duration of "forevev."

3. That the obvious misspellings were a "secret code" "used to establish the bonds' legitimacy."

4. A normal person carried an identification card which said "United Nations, New York affiliate 06 December 1997, Number 1010233."

5. This "was an international security matter."

6. The individual was doing the United States a favor as "his job was to bring the money to the United States for investment."

7. That he used the name of John Davidson because it was "related to his sensitive work and when you're dealing with the Russians and Chinese its very sensitive work."

8. That the notes, bonds and other instruments claimed to be au hentic bore inscriptions as (a) United States of America - THREE HUNDRED MILLION DOLLARS - [drawn on] Huau Qi Bank 1933, (b) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility fo the issue of US Dollra (sic) Bond to all over the world (sic) since 1935," and (c) a federal reserve note describing itself as "Hua Qi Bank Certificate Note [on which] [y]ou can draw one million U.S.

dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . 9signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949.

9. He needed the testimony of President Clinton, Attorney General Reno, Secretary of State Allbright, Senator D'Amato, Chiang Kai-shek, Treasury Secretary Rubin, Federal Reserve Chairman Greenspan and National Security Advisor Burger to explain to a court and jury the secret code and authenticity of the bonds, notes and other instruments.

Good old fashion common sense also tells the undersigned (if no one else) that such thinking is not only delusional, but patently and blatantly bizarre and that one who holds such beliefs must be suffering from a mental disease or defect which renders him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Under 18 U.S.C. § 4241(e), the law requires this Court to commit the defendant for such a reasonable time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed.

Accordingly, defendant's motion to dismiss must be and hereby is denied and defendant must appear on March 30, 2001 at 9:30 a.m. for sentencing

in accordance with this Memorandum and Order.

SO ORDERED.

District Judge, United States District Court

Dated: Central Islip, New York
March 21, 2001

BEST AVAILABLE COPY

[redacted]

NOV 0 0 1996 JACOB ZEDNER, being duly sworn, depose and say that

P.M. 11 8 1996 A.M.

1. I have been advised and fully understand I am entitled to a speedy trial under the Sixth Amendment to the United States Constitution, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), the Rules of this Circuit, and the Speedy Trial Plan adopted by this Court.

2. I have been advised and fully understand that this Court is prepared to give me a speedy trial in compliance with the foregoing authorities and commence such trial on January 17, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

A 46

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded

authorities and commence such trial on November 12, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time.

Defendant

Witnessed and approved:

Attorney for Defendant

Subscribed and sworn to before me this 8th day of November, 1996.

BEFORE: PLATT, J.

AT 9:30 am

CRIMINAL CAUSE
STATUS CONFERENCE

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
LONG ISLAND OFFICE
NOV 0 0 1996
TIME P.M. 11/8/96
TIME A.M.

CR-96-285 USA -v- JACOB ZEDNER

APPEARANCES: For GOVT.: AUSA-Leonard Lato
(516)228-3167

FOR DEFT. REYNOLDS CARONIA & GIANELLI
BY-James Hagney
(516)231-1199
200 Motor Parkway
PO Box 11177
Hauppauge, NY 11788
(appted under CJA)

Case called. A + counsel for both sides present. Conf. held Waiver of speedy trial for all time signed, to be filed. Order of excludable delay also signed, to be filed.
Case adj'd to 1/31/97 @ 9:30 AM for reas. placed on record

Code T, III, IV + X
11/8/96
1/31/97

A - 48

vs.

CASE NUMBER CR-96-283

NOV 0 1996

CASE NUMBER M _____

Jacob Yedner

TIME P.M. x 11/8/96 (M)
TIME A.M.

It is hereby stipulated that the time periods from 11/8/96

_____ until ( ) revocation of this stipulation/( ) 1/31/97

are excluded periods of delay under the following code(s):

SECTION 3161	DELAY CODE	DELAY CATEGORY
) (h)(1)(A)	A	Exam or hearing for mental or physical incapacity (18 U.S.C. 4244)
) (h)(1)(B)	B	NARA Exam (28 U.S.C. 2902)
) (h)(1)(D)	C	State or Federal trials or other charges
) (h)(1)(E)	D	Interlocutory appeals
) (h)(1)(F)	E	Pretrial Motions (from filing or being orally made to hearing or other prompt disposition)
) (h)(1)(G)	F	Transfers from other districts (Pursuant to F.R.Cr.P. 20, 21 & 40)
) (h)(1)(J)	G	Proceeding under advisement not to exceed 30 days
)	H	Miscellaneous proceedings: Parole or probat revocation, deportation, extradition
) (h)(1)(C)	5	Deferral of prosecution under 28 U.S.C. 290
) (h)(1)(H)	6	Transportation from another district or to/ from examination or hospitalization in ten days or less

) (h)(4) — N — Period of mental or physical incapacity of defendant to stand trial

) (h)(5) — O — Period of NARA commitment or treatment

) (h)(6) — P — Superseding indictment and/or new charges

) (h)(7) — R — Defendant awaiting trial of co-defendant when no severance has been granted

) (h)(8)(A)(B) — T — Continuances granted per (h)(8) as determined by the Court due to:

) I. Emergencies such as:
( ) a. natural disasters;
( ) b. blackouts;
( ) c. public transportation or other strikes which substantially affect the Court's ability to operate or the ability of the party to prepare for or proceed to
( ) d. illness or death of defense counsel, the prosecutor or the judge as well as mourning periods observed by the parties, counsel, or the Court.

) II. The cooperation of the defendant
(If this order is to be sealed due to the cooperation of the defendant, check appropriate area at the end of this order).

) III. The Government attorney or defense counsel has demonstrated due diligence in all available time, but nevertheless still require additional time for preparation prevent a miscarriage of justice such as:

( ) a. the attempt to locate an important witness whom defense counsel has not bee to locate;
( ) b. belated discovery motions or notice of alibi defense which require addition to investigate or expert analysis.

IV The assurance that both the defendant and the Governmentbe represented by couns choice and by the same attorney throughout the proceedings, such as:
( ) a. Counsel for the Government and/or the defendant are unavailable for either chosen by the Court, or the last date on which trial could commence under
( ) b. inadequate time to prepare for this trial following the conclusion of coun last trial;
( ) c. a brief vacation planned well in advance of the trial date.

[redacted] ( ) b. [redacted] co-defendants either

) VI. The Court orders the severance of the trial of one or more co-defendants either before trial commences or during trial.

) VII. Excusable error or neglect such as:
( ) a. miscalculation in the excludable time available;
( ) b. the failure of a clerk to file a dismissal of the complaint although direct by the Government to do so;
( ) c. the determination that a period of time previously held automatically exclu ed was incorrect.

) VIII. The case may be disposed of after other proceedings are concluded such as:
( ) a. pending Supreme Court case determinative of outcome;
( ) b. where appellate affirmance of another proceeding involving the defendant will result in the Government's dismissal of this case.

) IX. Time during the arrest-indictment or information interval by events beyond the control of the Court or the Government attorney, such as:
( ) a. the Government's desire to pursue leads furnished by the defense;
( ) b. a reasonable time needed for the completion of laboratory examination;
( ) c. emergencies such as the sickness of the Government attorney;
( ) d. cooperaton of the defendant;
( ) e. a reasonable period of time (not to exceed 60 days) beginning with the defendant's request to be considered for deferred prosecution;
( ) f. the time needed so that the Government attorney can comply with the Grand Jury Guidelines promulgated by the Department of Justice.

ECTION 3161	DELAY CODE	DELAY CATEGORY
	U	Time up to withdrawal of guilty plea
) (i)	W	Grand jury indictment time extended 30 more days
) (b)	X	(Other) Defense counsel seeks add'l time to review case & Govt concurs. Waiver of Speedy Trial for all time also signed

) This record of excludable delay is to be recorded upon the docket sheet by code only, and the order placed under seal by the Clerk of the Court.

The non-trial period of time pursuant to Title 18 U.S.C. 3161(c)(2) shall have commence on _____ (date of the first appearance through counsel or waiver of counsel).

BEST AVAILABLE COPY

Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 - 3174 (West 2005)

CHAPTER 208—SPEEDY TRIAL

Sec.

3161. Time limits and exclusions.
3162. Sanctions.
3163. Effective dates.
3164. Persons detained or designated as being of high risk.
3165. District plans—generally.
3166. District plans—contents.
3167. Reports to Congress.
3168. Planning process.
3169. Federal Judicial Center.
3170. Speedy trial data.
3171. Planning appropriations.
3172. Definitions.
3173. Sixth amendment rights.
3174. Judicial emergency and implementation.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day

period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent

preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076, and amended Pub.L. 96–43, §§ 2–5, Aug. 2, 1979, 93 Stat. 327, 328; Pub.L. 98–473, Title II, § 1219, Oct. 12, 1984, 98 Stat. 2167; Pub.L. 100–690, Title VI, § 6476, Nov. 18, 1988, 102 Stat. 4380; Pub.L. 101–650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 2902 of Title 28, referred to in subsec. (h)(1)(B), (C), (5), was repealed by Pub.L. 106–310, Div. B, Title XXIV, § 3405(c)(1), Oct. 17, 2000, 114 Stat. 1221.

Change of Name

Words "magistrate judge" substituted for "magistrate" in subsec. (c)(1) pursuant to section 321 of Pub.L. 101–650, set out as a note under 28 U.S.C.A. § 631.

Short Title

1979 Amendments. Section 1 of Pub.L. 96–43 provided: "That this Act [amending this section and sections 3163 to 3168, 3170 and 3174 of this title] may be cited as the 'Speedy Trial Act Amendments Act of 1979'."

1974 Acts. Section 1 of Pub.L. 93–619 provided: "That this Act [enacting this chapter and sections 3153 to 3156 of this title, and amending section 3152 of this title, and section 604 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Speedy Trial Act of 1974'."

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such

motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.)

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2080, and amended Pub.L. 96-43, § 6, Aug. 2, 1979, 93 Stat. 328.)

§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving—

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government,

A 56

shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96-43, § 7, Aug. 2, 1979, 93 Stat. 329.)

§ 3165. District plans—generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and fifth twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(3) Not later than June 30, 1980, each United States district court with respect to which implementation has not been ordered under section 3174(c) shall prepare and submit a plan in accordance with subsections (a) through (d) to govern the trial or other disposition of offenses within the jurisdiction of such court during the sixth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c) in effect prior to the date of enactment of this paragraph.

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96-43, § 8, Aug. 2, 1979, 93 Stat. 329; Pub.L. 101-647, Title XXXV, § 3577, Nov. 29, 1990, 104 Stat. 4929; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

References in Text

For the effective date of subsection 3161(b) and subsection 3161(c) referred to in subsec. (e)(3), see section 3163(a) and (b) of this title. The date of enactment of par. (3) of subsec. (e) of this section is the date of enactment of Pub.L. 96-43, which was approved Aug. 2, 1979. Subsecs. (a) and (b) of section 3163 of this title were not amended by Pub.L. 96-43.

Change of Name

"United States magistrate judges" substituted for "United States magistrates" in subsec. (a) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

§ 3166. District plans—contents

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the

A 57

United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications;

(8) the incidence of, and reasons for each thirty-day extension under section 3161(b) with respect to an indictment in that district; and

(9) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in the district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition;

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition; and

(7)(A) the number of new civil cases filed in the twelve-calendar-month period preceding the submission of the plan;

(B) the number of civil cases pending at the close of such period; and

(C) the increase or decrease in the number of civil cases pending at the close of such period, compared to the number pending at the close of the previous twelve-calendar-month period, and the length of time each such case has been pending.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

(f) Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by all district courts within that circuit to implement and secure compliance with this chapter.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2082, and amended Pub.L. 96-43, § 9(a)-(c), Aug. 2, 1979, 93 Stat. 329; Pub.L. 101-647, Title XXXV, § 3578, Nov. 29, 1990, 104 Stat. 4929.)

§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other

A 58

methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. Such reports shall also include the following:

(1) The reasons why, in those cases not in compliance with the time limits of subsections (b) and (c) of section 3161, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay.

(2) The category of offenses, the number of defendants, and the number of counts involved in those cases which are not meeting the time limits specified in subsections (b) and (c) of section 3161.

(3) The additional judicial resources which would be necessary in order to achieve compliance with the time limits specified in subsections (b) and (c) of section 3161.

(4) The nature of the remedial measures which have been employed to improve conditions and practices in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter.

(5) If a district has experienced difficulty in complying with this chapter, but an application for relief under section 3174 has not been made, the reason why such application has not been made.

(6) The impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in each district as demonstrated by the information assembled and statistics compiled and submitted under sections 3166 and 3170.

(c) Not later than December 31, 1979, the Department of Justice shall prepare and submit to the Congress a report which sets forth the impact of the implementation of this chapter upon the office of the United States Attorney in each district and which shall also include—

(1) the reasons why, in those cases not in compliance, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay;

(2) the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States Attorneys in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter;

(3) the additional resources for the offices of the United States Attorneys which would be necessary to achieve compliance with the time limits of subsections (b) and (c) of section 3161;

(4) suggested changes in the guidelines or other rules implementing this chapter or statutory amendments which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of this chapter; and

(5) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the litigation of civil cases by the offices of the United States Attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with this chapter.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96-43, § 9(e), Aug. 2, 1979, 93 Stat. 330.)

§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate judge, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, two private attorneys, one with substantial experience in the defense of criminal cases in the district and one with substantial experience in civil litigation in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding

A 53

other provisions of law he may be employed for any period of time during which his services are needed.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96-43, § 9(d), Aug. 2, 1979, 93 Stat. 330; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

Change of Name

"United States magistrate judge" substituted for "United States magistrate" in subsec. (a) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3170. Speedy trial data

(a) To facilitate the planning process, the implementation of the time limits, and continuous and permanent compliance with the objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics described in sections 3166(b) and 3166(c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and 3166(c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084, and amended Pub.L. 96-43, § 9(f), Aug. 2, 1979, 93 Stat. 331; Pub.L. 101-647, Title XXXV, § 3579, Nov. 29, 1990, 104 Stat. 4929.)

§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3172. Definitions

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate judge, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085, and amended Pub.L. 98-473, Title II, § 223(i), Oct. 12, 1984, 98 Stat. 2029; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1984 Acts. Amendment by Pub.L. 98-473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub.L. 98-473, set out as a note under section 3551 of this title.

Change of Name

"United States magistrate judge" substituted for "United States magistrate" in par. (1) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

Savings Provisions

1984 Amendments. Amendment by Pub.L. 98-473 effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.
(Added by Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

A 60

§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085, and amended Pub.L. 96-43, § 10, Aug. 2, 1979, 93 Stat. 331.)

HISTORICAL AND STATUTORY NOTES

References in Text

The date of enactment of the Speedy Trial Act Amendments Act of 1979, referred to in subsec. (d)(2), means the date of enactment of Pub.L. 96-43, which was approved Aug. 2, 1979.

CHAPTER 209—EXTRADITION

Sec.
3181. Scope and limitation of chapter.
3182. Fugitives from State or Territory to State, District, or Territory.
3183. Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States.
3184. Fugitives from foreign country to United States.
3185. Fugitives from country under control of United States into the United States.
3186. Secretary of State to surrender fugitive.

A 61

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(Added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Rule 52. Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

No. 04-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of the petition for a writ of certiorari and one copy of the application for leave to proceed in forma pauperis have been served by first-class mail on the Solicitor General of the United States.

Dated: New York, New York
August 22, 2005

By: _____

EDWARD S. ZAS
Counsel of Record

THE LEGAL AID SOCIETY
FEDERAL DEFENDER DIVISION
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 417-8742
Attorney for Petitioner

THE LEGAL AID SOCIETY
1876

FEDERAL DEFENDER DIVISION • SOUTHERN DISTRICT OF NEW YORK
52 DUANE STREET - 10th FLOOR, NEW YORK, N.Y. 10007 TEL: (212) 417-8700 FAX: (212) 571-0392

Federal Defender Division
Leonard F. Joy
Attorney-in-Charge

Appeals Bureau
Barry D. Leiwant
Attorney-in-Charge

August 22, 2005

Honorable William K. Suter
Clerk
Supreme Court of the United States
1 First Street, N.E.
Supreme Court Building
Washington, D.C. 20543

Re: JACOB ZEDNER v. UNITED STATES OF AMERICA
04-

Dear Mr. Suter:

Enclosed are ten copies each of a petition for a writ of certiorari with an attached appendix on behalf of Jacob Zedner, an application for leave to proceed in forma pauperis, and a certificate of service.

Three copies of the petition and appendix and one copy of the application for in forma pauperis relief have been served by first-class mail on the Solicitor General of the United States.

Very truly yours,

EDWARD S. ZAS
Associate Appellate Counsel

ESZ/gv
Enclosures

cc: Honorable Paul D. Clement
Acting Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

(5) ORIGINAL

Supreme Court, U.S.
FILED
NOV 22 2005
OFFICE OF THE CLERK

No. 05-5992

IN THE SUPREME COURT OF THE UNITED STATES

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's waiver of his rights under the Speedy Trial Act bars him from challenging delay resulting from a continuance that petitioner requested and the Act authorizes.

2. Whether the district court committed reversible error by not beginning petitioner's trial at a time when petitioner could not have been tried because of his incompetency to stand trial and his attorney's unavailability.

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-5992

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 401 F.3d 36.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 24, 2005. The petition for a writ of certiorari was filed on August 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on six

counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344. He was sentenced to 63 months of imprisonment. The court of appeals affirmed petitioner's convictions, but vacated the sentence and remanded for resentencing.

1. The Speedy Trial Act

The Speedy Trial Act (STA), 18 U.S.C. 3161, et. seq., requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Excluded from the computation of the 70 days are periods of delay resulting from: the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4); proceedings, including examinations, to determine the mental competency or physical capacity of the defendant, 18 U.S.C. 3161(h)(1)(A); interlocutory appeals, 18 U.S.C. 3161(h)(1)(E); the prompt disposition of pretrial motions, 18 U.S.C. 3161(h)(1)(F); and various other matters, 18 U.S.C. 3161(h). In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excludable "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "sets forth, in the record of the case, either orally

or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A).

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending upon the district court's weighing of various factors. Ibid.; United States v. Taylor, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. District Court Proceedings

In March 1996, petitioner attempted to open accounts at several financial institutions with a counterfeit $10 million bond. The bond contained obvious mistakes. One of the institutions called the Secret Service, which arrested petitioner and seized three additional counterfeit bonds from him, each in the amount of $10 million. Pet. App. A3-A4.

On April 6, 1996, petitioner was indicted. The district court excluded the time between June 7, 1996, and November 8, 1996, from the STA's 70-day period because of failures of petitioner's counsel to appear and the complexity of the case. On November 8, 1996, petitioner requested a continuance through the end of January 1997. The court informed petitioner that because it had lengthy trials

pending and was concerned that petitioner would invoke his speedy trial rights in the interim, it would grant the continuance only if petitioner executed a "waiver for all time" of his speedy trial rights. Pet. App. A4-A5. Petitioner agreed orally and signed a written waiver. His counsel further assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." Id. at A11. The court adjourned the proceedings until January 31, 1997, and issued no further orders of exclusion from the STA's 70-day period for the duration of the case. Id. at A5.

On January 31, 1997, the government announced that it was ready for trial, but petitioner's counsel requested a continuance until May 5, 1997, which was granted. Petitioner's counsel later requested to be relieved from duty because petitioner wanted to assert a frivolous defense at trial, and petitioner submitted to a psychiatric examination at the court's request. In August 1997, petitioner was judged competent to stand trial. Pet. App. A5, A15.

In September 1997, petitioner discharged his attorney and represented himself. Petitioner then filed numerous motions and subpoenas directed at high-ranking government officials, which caused the court to question petitioner's competency. On October 14, 1997, the day the trial was scheduled to begin, the court found that petitioner was not competent to stand trial and ordered him committed for hospitalization and treatment pursuant to 18 U.S.C.

4241(d). Petitioner took an interlocutory appeal, and the Second Circuit reversed and remanded for a new competency hearing. United States v. Zedner, 193 F.3d 562 (2d Cir. 1999). Pet. App. A6.

At a status conference on April 27, 2000, the government and petitioner moved that a competency hearing be held on July 10, 2000. A hearing was held on that date. Afterwards, the court asked for further briefs, which the parties filed in August 2000. Pet. App. A7.

On March 7, 2001, petitioner moved to dismiss the indictment on statutory and constitutional speedy trial grounds. The court denied that motion on the grounds that the case was complex and that petitioner had waived his speedy trial rights. Pet. App. A7-A8. The district court also found petitioner incompetent to stand trial, and the Second Circuit affirmed that determination. United States v. Zedner, 29 Fed. Appx. 711 (2d Cir. 2002). From May until August 2002, petitioner was confined in a federal medical facility for examination. The facility report concluded that petitioner was delusional but competent to stand trial. Pet. App. A7-A8.

The district court accepted that report, and began trial on April 7, 2003. The jury convicted petitioner on six counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344. He was sentenced to 63 months of imprisonment. Pet. App. A8-A9.

3. The Court of Appeals' Decision

The court of appeals affirmed the convictions, but vacated the sentence and remanded for resentencing because the district court may have misunderstood its authority to depart from the Sentencing Guidelines and its discretion pursuant to United States v. Booker, 125 S. Ct. 738 (2005). Pet. App. A2-A29. Petitioner argued, among other things, that he was denied his right to a speedy trial under the STA based on two periods of delay: January 31 to May 2, 1997; and August 11, 2000, until March 7, 2001.

a. The court of appeals held that petitioner waived his objection to the first of the disputed periods, during which time the trial was postponed at petitioner's request. Pet. App. A12-A15. After recognizing that defendants may not routinely waive their speedy trial rights, id. at A12, the court held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request," id. at A15.

The court of appeals noted that after petitioner waived his speedy trial rights, the district court "did not enter any orders of exclusion" from the STA's 70-day period "based on its assumption that the waiver 'for all time' removed all speedy trial issues from the case." Pet. App. A11; see id. at A4. The court concluded that "there can be no doubt that the district court could have properly

excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." Id. at A15. Thus, the court held, petitioner "cannot establish a Speedy Trial Act violation based on the grant of the delay he requested." Ibid.

The court of appeals emphasized, however, that "district courts contemplating adjournment of trial are far better advised to make prospective 'ends of justice' findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers 'for all time' seems particularly inadvisable." Pet. App. A15-A16 n.3.

b. The court of appeals held that the second period of challenged delay, from August 2000 until March 2001, did not violate the STA because petitioner "could not have been tried in this period, for two reasons": his counsel was "unavailable for trial due to complications resulting from her pregnancy," and petitioner "was not competent to stand trial." Pet. App. A16.

With respect to the second of those reasons, the court explained that the district court found petitioner to be incompetent and the court of appeals affirmed that decision. Pet. App. A16. The STA excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4). The court of appeals noted that "[i]t might be argued" that "the delay did not

result from the fact that [petitioner] was incompetent" to stand trial because the district court did not make findings to that effect. Pet. App. A17. But it concluded that "[t]he failure to start trial when [petitioner] could not have been tried was, at worst, a harmless, technical error." Ibid. The court recognized that many STA violations are not harmless, but concluded that "failure to consider the harmlessness of certain errors under the [STA] can result in perverse outcomes" and would be inconsistent with 28 U.S.C. 2111 and Federal Rule of Criminal Procedure 52(a), both of which instruct appellate courts to disregard errors that do not affect substantial rights. Pet. App. A18-A19.

ARGUMENT

1. Petitioner contends (Pet. 10-25) that the court of appeals erred by enforcing his wavier of speedy trial rights with respect to a three-month continuance that petitioner requested. That contention does not warrant further review.

a. Criminal defendants may waive their most fundamental constitutional and statutory rights. New York v. Hill, 528 U.S. 110, 114 (2000); United States v. Mezzanatto, 513 U.S. 196, 200-201 (1995); Peretz v. United States, 501 U.S. 923, 936 (1991). Statutory rights are presumptively waivable. Hill, 528 U.S. at 116; Mezzanato, 513 U.S. at 201. Thus, waiver of a statutory right is permissible unless Congress has affirmatively indicated an intent to preclude waiver, ibid., such as when the right at issue

is "so central to the [statute] that it is part of the unalterable 'statutory policy.'" Hill, 528 U.S. at 117.

In Hill, this Court held that defendants may waive their rights to trials within the time limits of the Interstate Agreement on Detainers Act (IAD) by agreeing to trial dates outside of those limits. 528 U.S. at 118. The Court recognized that the IAD authorizes "good cause continuances" in some circumstances, but concluded that such authorization does not, by negative implication, "constitute the 'affirmative indication' required to overcome the ordinary presumption that waiver is available." Id. at 116 (quoting Mazzenatto, 513 U.S. at 201). The Court also recognized that the IAD's time limits may benefit society as well as defendants, but explained that "[w]e allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." Id. at 117; see ibid. ("[I]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979)). In a footnote, the Court noted that the IAD and the STA differ in some respects, but it "express[ed] no view" on the waivability of the STA's time limits. Id. at 117 n.2.

b. In this case, the court of appeals followed circuit precedent "join[ing] with every circuit that has addressed the issue in finding that defendants generally may not elect to waive

the protections of the [STA]." United States v. Gambino, 59 F.3d 353, 359-360 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996); Pet. App. A12. It reasoned that the public interest in expeditious prosecution of criminal cases "would be undermined if the provisions of the Act intended for public benefit could be routinely nullified by a defendant's waiver." Id. at A12.

The court recognized a narrow exception, however, for situations in which the defendant requests a continuance that would be excludable from the 70-day STA period on the ground that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A); see Pet. App. A15. In such circumstances, an STA violation could arise, if at all, only because of the district court's failure to make an "ends of justice" finding in the record. As the court of appeals emphasized, the reason the district court did not make such a finding with respect to the challenged period in this case is that petitioner had expressly waived his speedy trial rights and assured the court that there would be no speedy trial issues in the case. Id. at A5, A11.

In that unusual circumstance, enforcing the waiver does not upset congressional policy. The STA expressly permits delay as long as "ends of justice" findings are made on the record. See 18 U.S.C. 3161(h)(8)(A). Holding a defendant to a waiver in the circumstances here merely prevents the defendant from inducing the

district court not to make "ends of justice" findings and then seeking dismissal based on the absence of such findings. This Court has long held that a defendant who invites an error may not then cite that error as a basis for reversal on appeal. See, e.g., Johnson v. United States, 318 U.S. 189, 200-201 (1943). That is precisely what petitioner is attempting to do here.

c. Although the court of appeals acknowledged its disagreement with the Fifth Circuit, see Pet. App. A13-A15 (citing United States v. Willis, 958 F.2d 60 (5th Cir. 1992)), the circuit split is narrower than petitioner suggests. Petitioner contends (Pet. 13-17) that the decision below also conflicts with decisions of the Third, Sixth, Eighth, Ninth, and Tenth Circuits. Those circuits' decisions are distinguishable.

The defendant in United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983), "was quite adamant that he proceed to trial as soon as possible, [and] that he would not waive any of his time limitations." Id. at 1353. Thus, no waiver issue was raised or discussed in that case. Similarly, in United States v. Ray, 768 F.2d 991 (8th Cir. 1985), the defendant moved to dismiss under the STA at the very beginning of the time period during which he was found not to have validly waived his STA rights. See id. at 993 n.2, 998.

Petitioner correctly acknowledges (Pet. 17) that United States v. Carrasquillo, 667 F.2d 382, 388 (3d Cir. 1981), addressed waiver

only as part of an "alternative holding." Moreover, the defendants in Carrasquillo, as well as in United States v. Pasquale, 25 F.3d 948 (10th Cir. 1994), and United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000), did not expressly waive their STA rights (as did petitioner), and the question in those cases was whether the defendants' mere requests for, or agreements to, later trial dates constituted implicit waivers. See Carrasquillo, 667 F.2d at 388; Pasquale, 25 F.3d at 952; Ramirez-Cortez, 213 F.3d at 1156. Here, in contrast, petitioner made an express waiver of his STA rights that induced the district court not to make "ends of justice" findings it could and presumably would have made but for the express waiver.[1]

For similar reasons, petitioner errs in contending (Pet. 16 n.12) that there is an intra-circuit conflict within the Tenth Circuit. Although that circuit upheld a waiver in United States v. McSwain, 197 F.3d 472 (1999), cert. denied, 529 U.S. 1138 (2000), and rejected one in Pasquale, supra, the circumstances were different. It appears that the defendant in McSwain (like petitioner here) expressly waived his STA rights, see 197 F.3d at 483, while, as explained above, the defendant in Pasquale did not,

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[1] Greenup v. United States, 401 F.3d 758, 764 (6th Cir. 2005) (depublished by order dated June 2, 2005), and United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir.), cert. denied, 508 U.S. 964 (1993), did not even involve challenges to the timeliness of trials. Instead, they involved challenges to the timeliness of indictments.

see 25 F.3d at 952. In any event, this Court does not sit to resolve intra-circuit conflicts. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

In addition to overstating the extent to which the decision below conflicts with decisions rejecting waivers, petitioner also overstates the extent to which other circuits have approved waivers. Petitioner contends (Pet. 18) that the Eleventh and District of Columbia Circuits have broadly held that all knowing and voluntary waivers of STA rights are enforceable. But in United States v. West, 142 F.3d 1408, 1413 (1998), vacated on other grounds, 526 U.S. 1155 (1999), the Eleventh Circuit upheld an express waiver only after finding, like the court of appeals below, that "the continuance served the 'ends of justice.'" In its earlier decision in United States v. Twitty, 107 F.3d 1482, cert. denied, 522 U.S. 902 (1997), the Eleventh Circuit appears to have determined that the time period covered by the defendant's express waiver was excludable for independent reasons, and the court therefore accepted the waiver only as part of an alternative holding. See id. at 1488 & n.3. Finally, the D.C. Circuit considered only the scope, as opposed to the validity, of an express waiver in United States v. Marshall, 935 F.2d 1298, 1302 (1991), apparently because no validity challenge was raised in that case.

d. The limited disagreement over the appropriateness of

waiver in the circumstances of this case does not warrant this Court's review not only because the decision below is correct, but also because that decision is unlikely to have significant prospective effect. The court of appeals cautioned district courts to make "ends of justice" findings in the future instead of relying on waivers. Pet. App. A15 n.3. District courts can be expected to follow that direction.

Moreover, the Second Circuit's holding is narrow: it applies only when the defendant requests a continuance that would be excludable under the substantive standards of the STA, but the district court fails to make "ends of justice" findings in the record. In those cases where the record is not adequately developed on the "ends of justice" issue -- which might often be the case in the absence of express district court findings -- even an express waiver would be unenforceable under the court of appeals' decision.

2. Petitioner also contends (Pet. 33-40) that the court of appeals erred in applying harmless-error principles to the time period between August 2000 and March 2001. That claim does not warrant further review.

a. The court of appeals' discussion of harmless-error principles was dictum. The court determined that petitioner could not have been tried during the relevant time period for two reasons: the unavailability of his attorney and his incompetence

to stand trial. Pet. App. A16, A19. The court then discussed harmlessness only with respect to the second of those grounds, and only hypothetically. Id. at A17. The court of appeals noted that "[i]t might be argued" that "the delay did not result from the fact that [petitioner] was incompetent" to stand trial because the district court did not make findings to that effect.[2] Pet. App. A17. But the court of appeals did not hold that the district court had in fact erred. Instead, it stated only that "any" error would have been harmless. Id. at A17, A20.

In fact, there was no error. The delay did result in part from petitioner's incompetence to stand trial, because petitioner could not have been tried when he was incompetent. The court of appeals stated that "[t]he argument might be made that the court's failure * * * to make a record that the delay resulted from the defendant's incompetence * * * was at least potentially a technical violation of the Act." Pet. App. A17. But even if that argument were made, it would not be a meritorious one. The STA requires district courts to make "ends of justice" findings for continuances excluded under 18 U.S.C. 3161(h)(8)(A), but it does not require findings for other periods of excludable delay, including periods in which the defendant is incompetent, see 18 U.S.C. 3161(h)(4).

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[2] The STA excludes from the 70-day period "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4).

Because there was no STA violation based on the August 2000 to March 2001 time period, the question whether any such violation would have been harmless is not properly presented here.

b. In any event, the court of appeals correctly applied harmless-error review to the alleged error. Such review is mandated for errors that do not affect a defendant's substantial rights. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a); see generally Neder v. United States, 527 U.S. 1, 7 (1999). Although petitioner argues that he should not have to show prejudice from delay (see Pet. 27-28), there was no relevant delay in the unusual circumstances of this case because petitioner could not have been tried during the time period in question, as explained above. Because this case involves at most a "technical" procedural violation that did not result in delay, Pet. App. A17, it does not implicate the distinct question whether substantive violations of the STA that result in delayed trials are subject to harmless-error review.

c. Nor does this case implicate a circuit split on the harmlessness issue. Although petitioner contends (Pet. 28-32) that there is a deep circuit split on the applicability of harmless-error analysis to STA violations, only one of the cited cases, United States v. Carey, 746 F.2d 228 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985), considered and rejected the applicability of the "harmless error" doctrine. Because that case held that there

had been no error and that the defendant received a timely trial, id. at 230-231, its consideration of harmless-error principles was dictum. Moreover, none of the cases cited by petitioner as rejecting harmless-error principles involved situations where, as here, there was no delay because the trial could not have begun during the challenged interval. See United States v. Crane, 776 F.2d 600, 604-606 (6th Cir. 1985) (holding that "ends of justice" continuance was not warranted); Perez-Reveles, 715 F.2d at 1352-1353 (same); Carey, 746 F.2d at 230 (same).[3]

Petitioner's reliance (Pet. 33-39) on United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001), is misplaced for similar reasons. The question in Taylor was whether dismissal under the STA should be with or without prejudice, not whether harmless-error analysis is ever appropriate. See 487 U.S. at 327-328. In Bozeman, Alabama violated Article IV(e) of the IAD by receiving a prisoner from another State for purposes of trying him, but then shuttling the prisoner back-and-forth between Alabama and the other State before the trial began. 533 U.S. at 149. Although this Court held that the violation of the IAD was not amenable to harmless-error analysis, id. at 153,

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[3] The pending petition in Smith v. United States, No. 05-7009 (filed Oct. 13, 2005), presents the question whether harmless-error principles apply to STA violations. In that case (unlike this one), the Seventh Circuit held that the 70-day STA period expired before the beginning of trial, but that the error was harmless. United States v. Smith, 415 F.3d 682, 686 (2005).

the alleged violation of the STA here is far different, in that it involves only the timing of a trial that was not delayed.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

THOMAS E. BOOTH
Attorney

NOVEMBER 2005

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[4] The unusual procedural issue presented here may not recur because of the court of appeals' instruction that district courts should make relevant findings in the future. See Pet. App. A15-A16 n.3. Although petitioner observes that two unreported Second Circuit decisions have cited the decision below, see Pet. 33 n.17 (citing United States v. Goykhman, 142 Fed. Appx. 487 (2005), and United States v. Friemann, 136 Fed. Appx. 396 (2005)), the district courts in those cases did not yet have the benefit of the decision below, and in Goykhman the court of appeals held that there was no error in any event, see 142 Fed. Appx. at 488.

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-5992

JACOB ZEDNER, PETITIONER

v.

UNITED STATES AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via e-mail and first class mail, postage prepaid, on this 22nd day of November, 2005.

SEE ATTACHED SERVICE LIST

Paul D. Clement/m

PAUL D. CLEMENT
Solicitor General
Counsel of Record

November 22, 2005

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

05-5992
ZEDNER, JACOB
USA

EDWARD S. ZAS
THE LEGAL AID SOCIETY FEDERAL DEFENDER
DIVISION APPEALS BUREAU
52 DUANE STREET, 10TH FLOOR
NEW YORK, NY 10007
212-417-8742

05-5681 ORIGINAL

No. 04-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

SUPREME COURT, U.S.
AUG 22 2005
OFFICE OF THE CLERK

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Jacob Zedner respectfully requests leave to proceed here in forma pauperis, without payment of fees and costs. Counsel certifies that, in the court below, counsel was appointed to represent petitioner pursuant to the Criminal Justice Act.

Dated: New York, New York
August 22, 2005

By: _____

EDWARD S. ZAS
Counsel of Record
THE LEGAL AID SOCIETY
FEDERAL DEFENDER DIVISION
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 417-8742
Attorney for Petitioner

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No. 05-5992

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

[redacted]

EDWARD S. ZAS
Counsel of Record

FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 417-8742

Attorney for Petitioner
JACOB ZEDNER

TABLE OF CONTENTS

Page

Table of Authorities ii

Preliminary Statement 1

Argument

I.

Respondent's effort to avoid review of the waiver question should be rejected 2

A. Respondent concedes the existence of a circuit split on the waiver issue, but understates the extent of the conflict. 2

B. The Second Circuit's waiver holding is not "narrow." 7

C. Respondent fails to show that the Second Circuit's broad waiver rule is consistent with the Act. 7

D. The waiver issue is important and recurring 10

II.

Respondent's effort to avoid review of the harmless-error question should be rejected 12

A. The Second Circuit's decision to apply harmless-error analysis was not dictum. 12

B. Respondent erroneously denies the existence of a circuit split on the harmless-error issue. . . 13

C. Respondent fails to distinguish this Court's decisions in United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001) 14

Conclusion 15

TABLE OF AUTHORITIES

CASES

Alabama v. Bozeman, 533 U.S. 146 (2001) 1, 14

Burnham v. Superior Court of California, 495 U.S. 604 (1990) 13

Greenup v. United States, 401 F.3d 758 (6th Cir. 2005) 5

New York v. Hill, 528 U.S. 110 (2000) 1

Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928) 5

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994) 3

United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981) 4, 8

United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished) petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710) 1, 10

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995) . . . 9, 10

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 3

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 3

United States v. Lagasse, 2005 WL 2620598 (D. Vt. Oct. 14, 2005) 10

United States v. Pasquale, 25 F.3d 948 (10th Cir. 1994) . . . 6

United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983) 4

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 3

United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) 5

United States v. Ray, 768 F.2d 991 (8th Cir. 1985) 6

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993) . . . 5

United States v. Smith, 415 F.3d 682 (7th Cir. Jul. 18, 2005) petition for cert. filed, (U.S. Oct. 13, 2005) (No. 05-7009) 1

United States v. Taylor, 487 U.S. 326 (1988) 1, 14

United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997) 5

United States v. Willis, 958 F.2d 60 (5th Cir. 1992) . . . 3, 7

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 5

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 3161 5

18 U.S.C. § 3161(h)(8) 4, 5, 11

18 U.S.C. § 3164 9

18 U.S.C. § 5036 9

A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Fed. Jud. Center 1980) 8

Preliminary Statement

Mr. Zedner's petition ("Pet.") demonstrated that this case presents a perfect opportunity for the Court to resolve an extensive circuit split on two important and recurring Speedy Trial Act questions, including the one left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000). The petition also showed that review is warranted because the Second Circuit's decision to apply waiver and harmless-error principles to excuse unauthorized pre-trial delays is inconsistent with the Act and with this Court's precedents. See Pet. at 22-27, 33-40.[1]

Respondent's Opposition Brief ("Opp.") offers no persuasive reason for the Court to delay resolving these significant issues. On the contrary, respondent concedes that there are good reasons to grant review. For example, respondent concedes that the circuits are divided at least 4-to-1 over the waiver question (Opp. at 11), that Hill did not resolve this split (id. at 9), and that, unless the Act's requirements can be waived, the statute's time limits apply automatically to every federal prosecution in the country

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[1] Since Mr. Zedner's petition was filed, two more petitions for certiorari have been filed that raise one or both of the same questions presented by this case. See United States v. Smith, 415 F.3d 682 (7th Cir. Jul. 18, 2005), petition for cert. filed, (U.S. Oct. 13, 2005)(No. 05-7009); United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished), petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710). These petitions, seeking review of decisions that expressly follow the precedent of Zedner, refute respondent's prediction that the legal questions presented here will not recur and that the Second Circuit's decision will not have much effect.

(id. at 2-3). Respondent therefore cannot dispute that this Court's guidance on the waiver and harmless-error issues would assist prosecutors, defense counsel, and judges across the country in the decisions they make each day concerning the timing of federal criminal proceedings.

Nevertheless, respondent opposes review. It argues that the circuit split on the waiver issue is "narrower than petitioner suggests" (Opp. at 11), that the Second Circuit's waiver ruling is "narrow" and "correct" (id. at 10), and that the Circuit's harmless-error decision was dictum (id. at 14). Respondent fails to support these arguments. It also does not refute petitioner's analysis showing that the Second Circuit's rulings contradict and undermine the Act.

In summary, respondent presents no good reason for the Court to defer resolving the conflict that exists over the two important questions presented. Accordingly, certiorari should be granted.

Argument

I.

Respondent's effort to avoid review of the waiver question should be rejected.

A. Respondent concedes the existence of a circuit split on the waiver issue, but understates the extent of the conflict.

Respondent acknowledges that the circuits are divided over whether compliance with the Act may be excused on a waiver theory.

It argues, however, that "the circuit split is narrower than petitioner suggests." Opp. at 11. Respondent is wrong.

Respondent contends that the split is limited to the First, Second, Fourth, and Seventh Circuits on one side, see United States v. Pringle, 751 F.2d 419, 434-36 (1st Cir. 1984); Zedner, A. 15; United States v. Keith, 42 F.3d 234, 239-40 (4th Cir. 1994); United States v. Kucik, 909 F.2d 206, 210-11 (7th Cir. 1990) (all recognizing a rule of implicit waiver); and the Fifth Circuit on the other, see United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994); United States v. Willis, 958 F.2d 60, 64 (5th Cir. 1992) (adopting a bright-line "no waiver" rule). Respondent excludes the Third, Sixth, Eighth, Ninth and Tenth Circuits from the split, claiming that these circuits' decisions did not involve express waivers, but only addressed whether "the defendants' mere requests for, or agreements to, later trial dates constituted implicit waivers." Opp. at 12 (emphasis added).

Respondent wrongly excludes these circuits from the split. Though petitioner signed an express waiver "for all time," only the district court denied petitioner relief on this ground. The Second Circuit, following its earlier precedent, agreed with petitioner that enforcing such a waiver would be inconsistent with the Act. A. 12.

Rather than enforcing express waivers, the Second Circuit recognized a sweeping rule of implied waiver, citing petitioner's

request for the 90-day delay that was granted in 1997. The Circuit held broadly that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15.

This holding conflicts, not merely with the Fifth Circuit, as respondent does not dispute, but also with decisions of the Third, Sixth, Eighth, Ninth and Tenth Circuits. All of these circuits hold that, absent on-the-record "ends of justice" findings by the district court, as required by the Act, see 18 U.S.C. § 3161(h)(8)(A), a delay caused or invited by the defendant "shall not be excludable" from the Act's 70-day time limit, id., on a waiver theory or otherwise. See Pet. at 14-18. Accordingly, all of these circuits are properly included along with the Fifth Circuit on the "no waiver" side of the circuit split.[2]

Respondent dismisses the Third Circuit's "no waiver" rule in United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981), as "only" an "alternative holding." Opp. at 11-12. An alternative holding, however, like any holding, is binding precedent, and therefore cannot be excluded from the split as mere dictum. See

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[2] Respondent contends that United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983), involved "no waiver issue" because the defendant there wanted "to proceed to trial as soon as possible." Opp. at 11. In fact, that request came only after the delay in question occurred. See 715 F.2d at 1349-50, 1352-53.

Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.") (citations omitted); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum [that] it is only one of two reasons given for the same conclusion....").[1]

Respondent likewise fails to distinguish the Sixth Circuit's and Tenth Circuit's "no waiver" decisions. See Pet. at 17-18. Respondent argues that Greenup v. United States, 401 F.3d 758 (6th Cir. 2005), and United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993), involved pre-indictment delay, not post-indictment delay. Opp. at 12 n.1. This is a distinction without a difference. The provision of the Act that authorizes an "ends of justice" exclusion only if enumerated findings are made on the record, 18 U.S.C. § 3161(h)(8)(A), applies with equal force to exclusions of time both pre- and post-indictment. See 18 U.S.C. § 3161(h) ("The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence...."); United States v. Ramirez-Cortez, 213 F.3d 1149,

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[1] Respondent repeats this same mistake in suggesting that United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997), can be excluded from the split because it enforced an express waiver "only" as part of an "alternative holding." Opp. at 13.

1156 (9th Cir. 2000) (applying same rules for "ends of justice" exclusions granted before and after indictment).[4]

The Tenth Circuit, moreover, is properly included in the split. That court holds that a "motion for a continuance does not constitute a waiver of the Act, as any 'waiver' by the Defendant is necessarily invalid unless the court simultaneously makes 'ends of justice' findings." United States v. Pasquale, 25 F.3d 948, 952 (10th Cir. 1994) (citation omitted). This bright-line "no waiver" rule applies even where 1) defense counsel represented to the trial court that a delay was necessary for his trial preparation, and, 2) the court understood that the defendant "would not assert the extension of time for his trial preparation as a violation of his speedy trial rights." Id. Accordingly, the Tenth Circuit's position is aligned with the Fifth Circuit's, but opposed to that of the Second Circuit.

In sum, the circuit split on the waiver question is as pronounced as petitioner described and far broader than respondent admits. It is ripe for resolution.

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[4] Respondent claims that in United States v. Ray, 768 F.2d 991 (8th Cir. 1985), "the defendant moved to dismiss under the [Act] at the very beginning of the time period during which he was found not to have validly waived his [Speedy Trial Act] right." Opp. at 11. However, that motion to dismiss was addressed only to the original indictment and was made before the defendant consented in writing to be tried on a superseding indictment beyond the Act's 70-day period. See 768 F.2d at 993 & n.2, 998 & n.11.

B. The Second Circuit's waiver holding is not "narrow."

The Second Circuit held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15.

There is nothing "narrow" about this holding, as respondent claims. Opp. at 10. On the contrary, the holding will allow waivers to be found routinely because the Government will almost always be able to claim on appeal, after the defendant was convicted, that every adjournment "serve[d] the ends of justice," even where, as in this case, no findings on that subject were ever made by the district court.

C. Respondent fails to show that the Second Circuit's broad waiver rule is consistent with the Act.

Respondent contends that, although Speedy Trial Act waivers are generally unenforceable, if a defendant also seeks delay, then "enforcing the waiver does not upset congressional policy." Opp. at 10. This position swallows the rule against waivers. As the Fifth Circuit has noted, "holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." Willis, 958 F.2d at 64.

Moreover, respondent never articulates its view of the "congressional policy" behind the Act. As the petition showed, the text of the Act authorizes waiver only where the defendant fails to move for dismissal before trial. Congress also made clear in the legislative history, "in the strongest possible terms," that recognizing other waivers would be "contrary to legislative intent and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." Carrasquillo, 667 F.2d at 389 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 28-29).

Respondent argues that the Second Circuit's waiver rule is correct because the violations of the Act in this case were supposedly petitioner's fault. Respondent claims that it was petitioner's own conduct that "induced the district court not to make ends of justice findings that it could and presumably would have made but for the express waiver." Opp. at 12.

These arguments are without merit, legally and factually. First, the Act contain no "fault" exception, because Congress considered and rejected it. See A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 32 (Fed. Jud. Center 1980) (noting that the original bill would have required dismissal only if the failure to bring a defendant to trial in time was "through no fault" of the defendant or his counsel; "The 1972

Senate subcommittee bill dropped the reference to 'fault.'").[5]

Furthermore, petitioner did not "induce" the Speedy Trial Act violations in this case. It was the court that proposed the waiver "for all time" to this mentally ill petitioner, not the other way around. The court assured petitioner in 1996, incorrectly, that such a waiver was valid and enforceable, even though the Second Circuit had already held at the time that such waivers were not valid. See United States v. Gambino, 59 F.3d 353 (2d Cir. 1995). And the prosecutor, who was obliged to bring petitioner to trial in a timely manner, never reminded the court of the Act's requirements or of the need for a speedy trial, even after petitioner requested a trial "as soon as possible" in August of 2000, despite the fact that the indictment was already more than four years old.

Respondent also errs by speculating that the district court "presumably" would have made "ends of justice" findings but for petitioner's express waiver. Opp. at 12. In fact, the opposite is true. The court stated in 1996 that, in the absence of a waiver, no further adjournments would be granted. A. 4-5. Furthermore, when defense counsel sought the 90-day continuance on January 31, 1997, the court was deeply skeptical that this request, for the

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[5] Cf. 18 U.S.C. § 3164(c) (providing an exception to the speedy trial rules for detained persons where the delay was the "fault of the accused or his counsel"); 18 U.S.C. § 5036 (Federal Juvenile Delinquency Act does not require dismissal where delay was "caused by" or "consented to by the juvenile or his counsel").

stated purpose of further "investigating" the authenticity of obviously phony bonds, was reasonable. See Tr., Jan. 31, 1997, at 6 ("THE COURT: I find it very difficult to believe anybody in the Treasury Department will authenticate these bonds and I'm trying to grasp what might be out there."). Indeed, the court stated, "This [case] is a year old. That's enough for a criminal case." Id., at 7. Accordingly, to the extent the record speaks to the issue at all, it shows, contrary to respondent's position, that, absent the express waiver "for all time," the court would not have found that the ends of justice outweighed the defendant's and the public's interest in a speedy trial.

D. The waiver issue is important and recurring.

Respondent claims that the Second Circuit's broad waiver holding is "unlikely to have significant prospective effect." Opp. at 14. Although Zedner was decided only recently (in March, 2005), its influence is already apparent. See United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished) (holding that Zedner "permit[s] waiver ... when delays result from defendants having 'request[ed] an adjournment that would serve the ends of justice'") (quoting Zedner); petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710); United States v. Lagasse, 2005 WL 2620598 (D. Vt. Oct. 14, 2005) (citing Zedner as "approving the position that when the record reflects [that] a delay requested by a defendant would serve the ends of justice, it is excludable even

if the court failed to place an ends-of-justice finding on the record"). And respondent's claim that the Second Circuit's decision is insignificant is belied by its current effort to persuade the D.C. Circuit to follow Zedner's waiver and harmless-error holdings. See Amended Brief for the United States at 24-30, United States v. Fonseca, No. 04-3078, scheduled for oral argument on Dec. 8, 2005 (D.C. Cir.).

To avoid review, respondent seizes upon a footnote in the Second Circuit's opinion stating that district courts are "far better advised" to make "ends of justice" findings, rather than to rely on waivers. Opp. at 7, 14, 18 n.4 (citing A. 15 n.3). This footnote, however, supports, rather than refutes, the need for certiorari. The footnote itself contravenes the Act by making precatory what the statute makes mandatory. The Act provides, "No ... period of delay resulting from a continuance granted by the court [at the request of the defendant] shall be excludable ... unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). In contrast, the court's footnote states that courts are "advised" to, but need not, make the "ends of justice" findings that the Act requires. Accordingly, the footnote, like the Second Circuit's opinion as a whole, sends

exactly the wrong message to courts and prosecutors: namely, that the requirements of the Act need not be taken seriously.

In sum, given the dramatic circuit split on the waiver question, and the Second Circuit's failure to heed the plain language of the Act, this Court should grant certiorari.

II.

Respondent's effort to avoid review of the harmless-error question should be rejected.

A. The Second Circuit's decision to apply harmless-error analysis was not dictum.

Respondent opposes review of the Second Circuit's decision to apply harmless-error analysis, arguing that it was dictum. Opp. at 14. The Second Circuit's own opinion defeats respondent's assertion. See A. 19 ("'Our holding [that harmless-error analysis applies] is not a signal that affirmance ... will routinely follow....'") (emphasis added; quoting Gambino); A. 17 ("Zedner argues that a violation of the Speedy Trial Act's 70-day period for bringing a defendant to trial cannot be deemed harmless, and that dismissal of the indictment is the mandatory remedy for any violation of the statute. We disagree."); A. 18 ("[W]e conclude that harmless error analysis is appropriate in Speedy Trial Act cases ...."); A. 19 ("[W]e believe the Speedy Trial Act should be interpreted, like other laws, to operate consistently with the overriding prescription of 28 U.S.C. 2111 that courts should disregard defects that do not affect substantial rights.").

Respondent asserts that resolution of the harmless-error issue was unnecessary because, respondent claims, the court ruled that the 165-day delay between August of 2000 and March of 2001 did not violate the Act. Opp. at 7, 15. Respondent has it backwards: the Circuit concluded that, although this unexplained delay might well have violated the Act, resolution of that issue was unnecessary, because any violation was harmless. A. 17-20. Accordingly, the harmless-error ruling was the exclusive ground for denying petitioner relief. This ruling was therefore the court's holding. See, e.g., Burnham v. Superior Court of California, 495 U.S. 604, 613 n.2 (1990) (plurality opinion) (the "exclusive basis for the judgment" cannot be dictum).[6]

B. Respondent erroneously denies the existence of a circuit split on the harmless-error issue.

The petition showed that only the Second and Seventh Circuits hold that a violation of the Act's 70-day time limit is subject to harmless-error analysis. All of the other circuits hold, in accordance with the plain language of the Act, that dismissal is mandatory for any violation, even if the defendant has suffered no prejudice. See Pet. at 28-31 & n.14.

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[6] Respondent claims that the long delay between August of 2000 and March of 2001 "result[ed] in part from petitioner's incompetence to stand trial...." Opp. at 15. This is untrue. Petitioner was not found incompetent until after this long delay occurred, and the district court never explained the cause of the delay. As far as the record shows, the court may have simply forgotten about this case during this period.

(7)

No. 05-5992

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

PAUL D. CLEMENT
Solicitor General
Counsel of Record
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Room 5614
Washington, D.C. 20530-0001
Tel.: (202) 514-4037
Fax: (202) 307-4613
Attorney for Respondent

EDWARD S. ZAS
Counsel of Record
BARRY D. LEIWANT
SEAN HECKER
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742
Fax: (212) 571-0392
Attorneys for Petitioner

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TABLE OF CONTENTS

Page

Chronological List of Relevant District Court Docket Entries 1

Chronological List of Relevant Second Circuit Docket Entries 61

Indictment, filed Apr. 4, 1996 66

Transcript of Status Conference, dated Nov. 8, 1996 70

Waiver of Speedy Trial Rights "for all time," entered Nov. 8, 1996 79

Transcript of Status Conference, dated Jan. 31, 1997 80

Post-Hearing Memorandum in Support of Defendant's Mental Competency, dated Aug. 4, 2000 87

Letter from Assistant United States Attorney to District Court in Support of Defendant's Mental Incompetency, dated Aug. 11, 2000 100

Defendant's Motion to Dismiss the Indictment pursuant to the Speedy Trial Clause and the Speedy Trial Act, dated Mar. 5, 2001, and Supporting Declaration 111

Memorandum in Support of Defendant's Motion to Dismiss the Indictment pursuant to the Speedy Trial Clause and the Speedy Trial Act, dated Mar. 5, 2001 115

Memorandum and Order Denying Defendant's Motion to Dismiss the Indictment with Prejudice Pursuant to the Speedy Trial Act and the Speedy Trial Clause and Committing the Defendant, dated Mar. 21, 2001, including attachments 128

Attachment I (Speedy Trial Waiver) 137

TABLE OF CONTENTS – Continued

Page

Attachment II (Memorandum and Order of October 19, 1998) 138

Letter from Assistant United States Attorney to District Court in Opposition to Defendant's Speedy Trial Motion, dated Mar. 22, 2001, and Supporting Affirmation 145

Transcript of Proceedings, dated Mar. 30, 2001 157

Letter from Assistant United States Attorney to District Court, dated Apr. 2, 2003 168

Transcript of Proceedings, dated Apr. 3, 2003 [excerpt] 170

Judgment of Conviction, filed Jan. 23, 2004 179

Opinion and Judgment of the Second Circuit, *United States v. Zedner*, 401 F.3d 36 (2d Cir. 2005) 189

Order of the Second Circuit denying rehearing and rehearing *en banc*, filed May 24, 2005 221

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. 96-cr-285

UNITED STATES OF AMERICA
v.
JACOB ZEDNER

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/13/1996	1	COMPLAINT as to Jacob Zedner [0:96-m-371] (Garcia, Maria) (Entered: 03/13/1996)
03/13/1996	–	ARREST of Jacob Zedner [0:96-m-371] (Garcia, Maria) (Entered: 03/13/1996)
03/13/1996	–	Before Magistrate Judge Lindsay, Magistrate Arraignment as to Jacob Zedner held on March 13, 1996. AUSA Leonard Lato, CJA Attorney James Hagney, and dft present. Temporary Order of Detention entered. Detention hearing scheduled for March 15, 1996 at 10:30 AM before Magistrate Judge Lindsay. (Defendant informed of rights.) [0:96-m-371] (Garcia, Maria) (Entered: 03/13/1996)
03/13/1996	2	TEMPORARY COMMITMENT issued as to Jacob Zedner (Signed by Magistrate Arlene R. Lindsay, dated 3/13/96 [0:96-m-371] (Garcia, Maria) (Entered 03/13/1996)

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/13/1996	3	CJA 23 FINANCIAL AFFIDAVIT by Jacob Zedner [0:96-m-371] (Garcia, Maria) (Entered 03/13/1996)
03/13/1996	4	CALENDAR ENTRY as to Jacob Zedner; Case called before Magistrate Arlene R. Lindsay on date of 3/13/96 for arraignment Tape # (96-2) 51-950. AUSA L. Lato, James Hagney appointed court attorney for dft. Temporary order of detention entered for dft. Detention hearing scheduled for 3/15/96 at 10:30 AM. [0:96-m-371] (Garcia, Maria) (Entered: 03/13/1996)
03/15/1996	5	CALENDAR ENTRY as to Jacob Zedner; Case called before Magistrate Arlene R. Lindsay on date of 3/15/96 for detention hearing Tape # 96-2 (950-3725). AUSA Leonard Lato present, James Hagney, CJA Atty and dft present. Dft released on $500,000.00 surety bond secured by property located at 72 Hicks Lane, Great Neck, NY, and 130 E. Saint Marks Lane, Valley Stream, NY. See bond for additional conditions of release. [0:96-m-371] (Garcia, Maria) (Entered: 03/21/1996)
03/15/1996	6	Surety BOND entered by Jacob Zedner in Amount $500,000.00 (Signed by Magistrate Arlene R. Lindsay, dated 2/15/96) Bond

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/15/1996	6	secured by properties located at 72 Hicks Lane, Great Neck, and 130 E. Saint Marks Place, Valley Stream. Dft must remain in EDNY & SDNY area. Dft to report to probation dept once a week in person. Dft to surrender passport by 3/19/96. Dft to submit a confession of judgment. [0:96-m-371] (Garcia, Maria) (Entered: 03/21/1996).
03/22/1996	7	Appearance BOND entered by Jacob Zedner in Amount $500,000 (Signed by Magistrate Arlene R. Lindsay, dated 3/15/96) [0:96-m-371] (Costa, Bill) (Entered: 03/25/1996)
04/04/1996	8	INDICTMENT as to Jacob Zedner (1) count(s) 1-7, 8 (fe) (Entered: 04/04/1996)
04/16/1996	9	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 4/16/96 for Criminal cause for arraignment Court Reporter/ESR Joe Barbella, Dft present with CJA counsel James Hagney, Govt: Leonard Lato, Dft's first appearance, Dft arraigned, sworn, and informed of rights, Not Guilty: Jacob Zedner (1) count(s) 1-7, 8 Bail previously set by the Magistrate Judge to remain, Court stops the speedy trial clock for reasons on the record, Case adj'd to 6/7/96 at 11:00am (Crotty, Mary) Modified on 04/16/1996 (Entered: 04/16/1996)

FILING DATE	DOCKET NUMBER	DESCRIPTION
06/07/1996	11	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 6/7/96 at 11:00 am for CR cause for motions Court Reporter/ESR Jennifer Maul, Only AUSA Leonard Lato present and he reports no motions have been filed by dft. He further indicates he has contacted dft's attorney but his office indicates he is not there. Set status conference for 9:30 6/21/96 for Jacob Zedner Judge Thomas C. Platt Excludable delay order signed, to be filed. Court places statement on record excluding time. (Donovan, Donna) (Entered: 06/12/1996)
06/07/1996	12	ORDER of Excludable Delay as to Jacob Zedner from 6/7/96 to 6/21/96 (Signed by Judge Thomas C. Platt dated: 6/7/96) (Donovan, Donna) (Entered: 06/12/1996)
06/21/1996	13	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 6/21/96 at 9:30 am for CR cause for status conference Court Reporter/ESR Pam Maddock Case called. Only AUSA Leonard Lato present court orders issuance of a bench warrant but stays execution of bench warrant until 6/26/96 at 9:30 am at which time dft and his counsel should appear. (Donovan, Donna) (Entered: 06/26/1996)

FILING DATE	DOCKET NUMBER	DESCRIPTION
06/24/1996	14	LETTER dated 6/24/96 from Leonard Lato to James F. Hagney RE: Informing you that a status conference will be held at 9:30 am. Because the dft did not appear at the conference of 6/7/96 and 6/21/96, Judge Platt has ordered that a warrant issue for the dft's arrest. The order is stayed until 6/26/96. (Donovan, Donna) (Entered: 06/26/1996)
06/26/1996	15	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 6/26/96 at 9:30 am for CR cause for status conference Court Reporter/ER Joe Barbella, AUSA Leonard Lato and dft present. No appearance by dft's atty. Mr. Hagney. Courtroom deputy clerk informs court that Mr. Hagney is before a state court Judge and will not be able to get here before 2:00 pm. Circumstances of counsel's prior failure to appear placed on record by Govt. and Court. Case called at 2:00 pm Dft Zedner present with CJA counsel James Hagney. Mr. Hagney apologizes to court and also indicates on record he never received notice of prior appearances. Court warns counsel that this behavior will not be tolerated again. Both sides agree

FILING DATE	DOCKET NUMBER	DESCRIPTION
		case is complex. Order excludable delay based on complexity of case signed, to be filed. Govt. indicates time is needed by defense counsel to review documents in Washington. Any outstanding discovery except for Washington documents, set discovery due for 7/1/96 for Jacob Zedner, Bench warrant vacated. Set status conference for 9:30 9/6/96 for Jacob Zedner before Judge Thomas C. Platt (Donovan, Donna) (Entered: 06/27/1996)
06/26/1996	16	ORDER of Excludable Delay as to Jacob Zedner from 6/21/96 through 9/6/96 (Signed by Judge Thomas C. Platt dated: 6/26/96) (Donovan, Donna) (Entered: 06/27/1996)
09/06/1996	19	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 09/06/96 at 9:30 am for CR cause for Status Conference Court Reporter/ESR Joe Barbella, Dft present with CJA counsel James Hagney. Govt: Leonard Lato. Status conference held. set status conference for 9:30 11/8/96 for Jacob Zedner before Judge Thomas C. Platt Order of excludable delay and waiver of speedy trial signed, to be filed. (Donovan, Donna) (Entered: 09/18/1996)

FILING DATE	DOCKET NUMBER	DESCRIPTION
09/06/1996	20	WAIVER OF SPEEDY TRIAL AND ORDER OF EXCLUDABLE DELAY as to Jacob Zedner (Signed by Judge Thomas C. Platt dated: 9/6/96) (Donovan, Donna) (Entered: 9/18/1996)
11/08/1996	21	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 11/8/96 at 9:30 am for CR cause for status conference Court Reporter/ESR Owen Wicker, Dft and counsel for both sides present. Waiver of speedy trial for all time signed, to be filed. Order of excludable delay also signed, to be filed. Reset status conference for 9:30 1/31/97 for Jacob Zedner before Judge Thomas C. Platt for reasons stated on record. (Donovan, Donna) (Entered: 11/08/1996)
11/08/1996	22	WAIVER of Speedy Trial by Jacob Zedner (signed by Laura Giangarra, 11/8/96) (Donovan, Donna) (Entered: 11/08/1996)
11/08/1996	23	ORDER OF EXCLUDABLE DELAY as to Jacob Zedner (Signed by Judge Thomas C. Platt dated: 11/8/96) (Donovan, Donna) (Entered: 11/08/1996)
01/31/1997	25	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 1/31/97 at

FILING DATE	DOCKET NUMBER	DESCRIPTION
		9:30 am for cause for status conference Court Reporter/ESR Owen Wicker, Dft present with CJA counsel James Hagney. Govt: Leonard Lato. Govt. reports case ready for trial. Dft not ready. Set jury selection for 9:30 5/5/97 for Jacob Zedner before Judge Thomas C. Platt, set Jury trial for 9:30 5/5/97 for Jacob Zedner before Judge Thomas C. Platt (Donovan, Donna) (Entered: 02/10/1997)
05/02/1997	26	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 5/2/97 @ 9:30am for Criminal Cause for Conference Court Reporter/ESR Ron Tolkin, deft present with CJA counsel James Hagney and Tracey Gaffey (LAS). Govt: Leonard Lato. Deft's motion to be relieved as counsel argued DENIED at this time for the reasons stated on the record. Court directs Tracey Gaffey from (LAS) to confer with deft. in an advisory capacity. The Court orders the Govt to make arrangements to have the deft. examined by Dr. Goldstein (psychiatrist). If the examination proves deft is able to proceed to trial, the deft. will try his case pro se with LAS in an advisory capacity. Deft. indicates he is willing to be examined by Dr. Goldstein. The

FILING DATE	DOCKET NUMBER	DESCRIPTION
		Court indicates it will so order all subpoenas including a representative from the Treasury Department. Jury selection and trial previously set for 5/5/97 adjourned without date pending report of Dr. Goldstein on deft. Set status conference for 9:30 5/16/97 for Jacob Zedner before Judge Thomas C. Platt Court informs Mr. Hagney that he need not be present at that time. (fe) (Entered: 05/06/1997)
05/16/1997	27	ORDER as to Jacob Zedner, that a hearing shall be held on the present mental competency of the dft. (see order for further details) (Signed by Judge Thomas C. Platt dated: 5/16/97) (Donovan, Donna) (Entered: 05/20/1997)
05/16/1997	28	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 5/16/97 at 9:30 am for cause for conference on update on report of Dr. Goldstein. Court Reporter/ESR Harry Rapaport Dft and counsel for both sides present. Order signed in court RE: Dft's examination by psychiatrist Dr. Goldstein. Order handed to Govt. to make correction. Govt. will correct and resubmit. Dft to complete financial affidavit. as soon as this is accomplished the court will appoint

FILING DATE	DOCKET NUMBER	DESCRIPTION
		(L.A.S.) by Tracey Gaffey for all purposes. Case adjourned without date, to be rescheduled once doctor's report is furnished. (Donovan, Donna) (Entered: 05/20/1997)
08/07/1997	29	LETTER dated 8/5/97 from Naomi Goldstein to Judge Platt Re: Pursuant to your order, I have evaluated Jacob Zedner as to his history and present symptoms and my opinion as to his diagnosis, if any, prognosis and his competency to stand trial. (Donovan, Donna) (Entered: 09/17/1997)
09/08/1997	30	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 9/8/97 at 9:30 am for CR cause for conference Court Reporter/ESR Harry Rapaport Dft present with Legal Aid Counsel Randi Chavis. Govt: Leonard Lato. Dft, himself, addresses the court. The court warns dft that anything he says can be used against him and advises him not to speak. Dft wishes to speak, anyway. Dft indicates there is a problem with his Legal Aid Attorney. The court informs dft that no further attorneys will be appointed by this court. Dft wishes to proceed prose but asks the court to ask his

FILING DATE	DOCKET NUMBER	DESCRIPTION
		attorney to assist him. The court GRANTS dft's request. Ms. Chavis, or someone from her office will assist dft in preparation for the trial and to prepare the subpoenas. Dft indicates he will be preparing subpoenas for the President of the US, Attorney General etc. Case adjourned to 10/20/97 at 9:30 am for return of the subpoenas. If no motions to quash are submitted the court will select a jury. (Donovan, Donna) (Entered: 09/17/1997)
09/22/1997	32	ORDER as to Jacob Zedner The Court has "So Ordered" and signed the nine subpoenas addressed to private persons but declines to "So Order" or sign the remaining subpoenas addressed to government officials or agencies without affording the U.S. Attorney an opportunity to be heard with respect to the same Objections, if any, to be received on or before Thursday 9/25/97 by 4pm. The Court will proceed with the issuance of these additional subpoenas if objections are not received. (Signed by Judge Thomas C. Platt, dated: 9/22/97) c/m (fe) (Entered: 10/01/1997)
09/25/1997	31	LETTER dated 9/24/97 from Leonard Lato (AUSA) to Judge Platt RE: in response to the Court's Memorandum

FILING DATE	DOCKET NUMBER	DESCRIPTION
		and Order dated 9/22/97, the US Attorney submits this letter to object to the deft's request that the subponeas be "So Ordered." (fe) (Entered: 09/30/1997)
09/27/1997	35	Subpoena issued to Mrs. Anna Chenault a/k/a Chen, Hsiang, May Washington D.C., Mr. Lance S. Adler J.D. Esq., Mr. John Fegon, Assistant Manager of Marine Midland Bank, Mr. Jim Palsh, Treasurer of Merrill Lynch; Miss Ann Allen, VP of Merrill Lynch; Mr. James Young, Manager of Marine Midland Bank; Weston Keith Frank; Mr. Stan Jutkowitz and Don Clark, Esq.; John Reed, The Chairman of Citicorp and City Bank International by Jacob Zedner as to Jacob Zedner to appear on 10/20/97 at 9:30 am at the US District Court. So Ordered by Judge Platt (Donovan, Donna) (Entered: 10/15/1997)
09/29/1997	33	LETTER dated 9/29/97 from Leonard Lato to Judge Platt RE: the U.S. Attorney opposes the deft's request for issuance of the additional subpoenas. (fe) (Entered: 10/01/1997)
09/29/1997	34	ORDER as to Jacob Zedner the Court declines to "So Order" or sign the 13 subpoenas submitted by deft (Signed by Judge Thomas C. Platt, dated: 9/29/97) c/m (fe) (Entered: 10/01/1997)

FILING DATE	DOCKET NUMBER	DESCRIPTION
10/07/1997	36	Dft Request issuing of subpoena by Jacob Zedner (Donovan, Donna) (Entered: 10/23/1997)
10/08/1997	37	Return of Service of the subpoena served on Mr. James Young, Manager of Marine Midland Bank on 9/29/97. (Donovan, Donna) (Entered: 10/23/1997)
10/08/1997	38	Return of Service of Subpoena on Miss Ann Allen by Jacob Zedner on 9/29/97. (Donovan, Donna) (Entered: 10/23/1997)
10/08/1997	39	Return of Service of Subpoena on Mr. John Fegon by Jacob Zedner on 9/29/97. (Donovan, Donna) (Entered: 10/23/1997)
10/08/1997	40	Return of Service of Subpoena on Mr. Jim Palsh by Jacob Zedner on 10/1/97. (Donovan, Donna) (Entered: 10/23/1997)
10/08/1997	41	Return of Service of Subpoena on Mr. Lance S. Adler J.D. by Jacob Zedner on 10/7/97 (Donovan, Donna) Modified on 10/23/1997 (Entered: 10/23/1997)
10/08/1997	53	LETTER dated 10/8/97 from Petra T. Tasheff to Judge Platt RE: Responding to the Subpoena directed to "John S. Reed The Chairman of Citicorp and City Bank International" to appear before this court with any documents

FILING DATE	DOCKET NUMBER	DESCRIPTION
		within the scope of the subpoena. (Donovan, Donna) (Entered: 11/06/1997)
10/14/1997	42	MOTION as to Jacob Zedner to quash subpeona to Lance S. Adler; Motion Hearing/Return date of 9:30 10/20/97 for Jacob Zedner motion (Donovan, Donna) (Entered: 10/23/1997)
10/15/1997	54	LETTER dated 10/15/97 from Jacob Zedner to Judge Platt RE: Request permission to file a response to Citibank's letter dated 10/8/97. (Donovan, Donna) (Entered: 11/06/1997)
10/15/1997	55	LETTER dated 10/15/97 from Jacob Zedner to Judge Platt Re: Advising the court that my court appointed attorney, Randi Chavis, refuses to help me with my paper work. (Donovan, Donna) (Entered: 11/06/1997)
10/15/1997	60	LETTER dated 10/13/97 from Jacob Zedner to Judge Platt Re: Responding to letter dated 10/8/97 of the Citibank Corp. (Donovan, Donna) (Entered: 11/06/1997)
10/16/1997	56	LETTER dated 10/14/97 from Bruce Lilling to Judge Platt Re: Requesting that the subpoena on Weston Keith Frank be quash, since no witness fee or travel

FILING DATE	DOCKET NUMBER	DESCRIPTION
		expenses were given to Mr. Frank at the receipt of the subpoena. (Donovan, Donna) (Entered: 11/06/1997)
10/16/1997	–	ORDER as to letter dated 10/16/97 regarding subpoena on Weston Keith Frank, If no witness fees were in fact paid subpoena does not have to be bound. (Signed by Judge Thomas C. Platt dated: 10/16/97) (Donovan, Donna) (Entered: 11/06/1997)
10/17/1997	43	MOTION as to Jacob Zedner for Pamela K. Riley to appear pro hac vice for purposes of the motion to quash the subpoena that was served on Stanley S. Jutkowitz (Donovan, Donna) (Entered: 10/23/1997)
10/17/1997	44	MOTION as to Jacob Zedner to quash the subpoena served on Stanley S. Jutkowitz; Motion Hearing/Return date of 9:30 10/20/97 for Jacob Zedner motion (Donovan, Donna) (Entered: 10/23/1997)
10/17/1997	45	MEMORANDUM as to Jacob Zedner in support of [44-1] motion to quash the subpoena served on Stanley S. Jutkowitz (Donovan, Donna) (Entered: 10/23/1997)

FILING DATE	DOCKET NUMBER	DESCRIPTION
10/17/1997	57	MOTION as to Weston Keith Frank to quash the subpoena (Donovan, Donna) (Entered: 11/06/1997)
10/20/1997	46	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 10/20/97 at 9:30 am for CR cause for motion to quash subpoena Court Reporter/ESR Harry Rapaport Dft present appearing pro se and being assisted by Randi Chavis of Legal Aid. Govt: Leonard Lato. Case referred to Mag. Judge Boyle re: motions to quash subpoenas. (Donovan, Donna) (Entered: 10/23/1997) FILING
10/20/1997	47	MOTION by Jacob Zedner to dismiss all charges (Donovan, Donna) (Entered: 10/23/1997)
10/20/1997	48	MOTION by Jacob Zedner for an investigation of act of treason/conspiracy. (Donovan, Donna) (Entered: 10/23/1997)
10/20/1997	49	MOTION by Jacob Zedner for the court to order the investigation of violations of my civil rights (Donovan, Donna) (Entered: 10/23/1997)
10/20/1997	50	CALENDAR ENTRY as to Jacob Zedner; Case called before Magistrate E. T. Boyle on date of 10/20/97 @ 11:40am for CR Cause

FILING DATE	DOCKET NUMBER	DESCRIPTION
		For Motions To Quash Subpoenas; Court Reporter/ESR Harry Rapaport; Govt: Leonard Lato; Deft present with counsel Randi Chavis; Exhibit #1A, 1B admitted as Court Exhibits. Signature of Mr. Zedner marked as Exhibit C. Exhibits 1A, 1B and 1C to be filed under seal. (fe) (Entered: 10/24/1997)
10/20/1997	59	Copy of the Counsel on Foreign Relations submitted by Citibank at the hearing before Mag. Judge Orenstein to quash subpoena. (Donovan, Donna) (Entered: 11/06/1997)
10/24/1997	51	REPORT AND RECOMMENDATIONS of Magistrate E. T. Boyle as to Jacob Zedner Re: [44-1] motion to quash the subpoena served on Stanley S. Jutkowitz, [42-1] motion to quash subpeona to Lance S. Adler; Recommends that the motions be denied; Motion no longer referred Objections to R and R due by 11/3/97 (Donovan, Donna) (Entered: 10/31/1997)
10/24/1997	52	ORDER as to Jacob Zedner denying [49-1] motion for the court to order the investigation of violations of my civil rights as to Jacob Zedner (1), denying [48-1] motion for an investigation of act of treason/ conspiracy. as to Jacob Zedner

FILING DATE	DOCKET NUMBER	DESCRIPTION
		(1), denying [47-1] motion to dismiss all charges as to Jacob Zedner (1) (Signed by Judge Thomas C. Platt, dated: 10/24/97) c/m (Donovan, Donna) (Entered: 10/31/1997)
10/24/1997	58	Return of Service of the Subpoena on John Reed "The Chairman of Citicorp and City Bank International" by Jacob Zedner (Donovan, Donna) (Entered: 11/06/1997)
11/03/1997	62	Objection of Lance Adler to the Report and Recommendation of Mag. Judge Boyle dated 10/24/97. (Donovan, Donna) (Entered: 11/24/1997)
11/04/1997	63	Objections to Report and Recommendation of Mag. Judge Boyle dated 10/24/97. (Donovan, Donna) (Entered: 11/24/1997)
11/06/1997	61	AFFIDAVIT by Pamela K. Riley on behalf of Stanley S. Jutkowitz Re: In support of motion to Quash the subpoena. (Donovan, Donna) (Entered: 11/06/1997)
11/10/1997	64	Return of service of Subpoena on Mr. Stan Jutkowitz and Don Clark by Jacob Zedner (Donovan, Donna) (Entered: 11/24/1997)
11/17/1997	65	ORDER as to Jacob Zedner Affirming the report and recommendation by Mag. Judge Orenstien and adopted denying [44-1] motion to

FILING DATE	DOCKET NUMBER	DESCRIPTION
		quash the subpoena served on Stanley S. Jutkowitz as to Jacob Zedner (1), denying [57-1] motion to quash the subpoena as to Zedner (1), denying [42-1] motion to quash subpeona to S. Adler as to Jacob Zedner (1) (Signed by Judge Thomas C. Platt, dated: 11/17/97) (Donovan, Donna) (Entered: 12/05/1997)
11/19/1997	66	AMENDED ORDER as to Jacob Zedner Amending order dated 11/17/97 (Signed by Judge Thomas C. Platt dated: 11/19/97) (Donovan, Donna) (Entered: 12/05/1997)
12/05/1997	67	Return of service of the Subpoena served on Weston Keith Frank by Jacob Zedner (Donovan, Donna) (Entered: 12/05/1997)
12/16/1997	69	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 12/16/97 at 9:30 am for CR cause for conference Court Reporter/ ESR Harry Rapaport Only AUSA Leonard Lato present and reports he was on trial and has not spoken to Randi Chavis. Case adjourned to 12/17/97 at 9:30 am, if not then 12/19/97 at 9:30 am. (Donovan, Donna) (Entered: 12/23/1997)

FILING DATE	DOCKET NUMBER	DESCRIPTION
12/17/1997	68	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 12/17/97 at 9:30 am for CR cause for conference Court Reporter/ ESR Harry Rapaport, DFt present with Legal Aid counsel Tracey Gaffey. set jury selection for 9:30 2/17/98 for Jacob Zedner before Judge Thomas C. Platt, set Jury trial for 9:30 2/17/98 for Jacob Zedner before Judge Thomas C. Platt (Donovan, Donna) (Entered: 12/22/1997)
01/30/1998	70	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 1/30/98 at 9:30 am for CR cause for conference Court Reporter/ ESR Joe Barbella Deft present pro se with Legal Aid Counsel Tracey Gaffey. Govt: Leonard Lato. Court So Orders Deft's subpoenas. Jury selection and trial scheduled for 2/17/98 is adjourned. Status conference set for 4/17/98 at 9:30 am. (Donovan, Donna) (Entered: 02/03/1998)
01/30/1998	71	LETTER dated 1/30/98 from Jeanette Redmond to Jacob Zedner Re: Enclosing two subpoenas which were "So Ordered" by Judge Platt. (Donovan, Donna) (Entered: 02/06/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
01/30/1998	72	"So Ordered" Subpoenas to Head Office City Bank International New York by Jacob Zedner as to Jacob Zedner (Donovan, Donna) (Entered 02/06/1998)
01/30/1998	73	"So Ordered" Subpeonas to The Federal Reserve Bank of the United States of America by Jacob Zedner as to Jacob Zedner (Donovan, Donna) (Entered: 02/06/1998)
02/12/1998	75	LETTER dated 2/12/98 from AUSA Leonard Lato to USDJ Platt RE: in support of motion to quash defendant's subpoena to (1) The Treasury Departments of the USA Washington, D.C. and (2) The Treasury Department of Treasury International Corporation. (Branciforte, Ralph) (Entered: 03/23/1998)
02/20/1998	74	MOTION by USA as to Jacob Zedner to quash deft's subpoena to the Federal Reserve Bank of the USA, Washington D.C. (fe) (Entered: 03/02/1998)
02/20/1998	–	ENDORSED ORDER as to Jacob Zedner granting [74-1] motion to quash deft's subpoena as to the Federal Reserve Bank of the USA, Washington D.C. as to Jacob Zedner (1) (Judge Thomas C. Platt, dated 2/20/98) Order entered on document # 74 c/m (fe) (Entered: 03/02/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
02/23/1998	76	LETTER dated 2/18/98 from Jacob Zedner to USDJ Platt RE: The Board of Governors of the Federal Reserve System submitted papers neglecting to reference any of the Federal Reserve Numbers which were assigned to John Davidson aka Jacob Zedner for Jazoroff Holding Group Ltd. under Criminal and Political responsibility for the Asset of the Plum Trust aka MEI HUA Trust (Humanitarian Trust) worlwide [sic]. I Respectfully request that a hearing date regarding this Nation Security matter be scheduled as soon as possible. (Branciforte, Ralph) (Entered: 03/24/1998)
02/23/1998	–	ENDORSED ORDER as to Jacob Zedner. Request for a Hearing Date is denied. Motion to quash its subpoena served on the Secretary of The Board of Governors of the Federal Reserve System is granted on the grounds set forth in the letter motion of the Board to this Court received on 2/18/98. (Judge Thomas C. Platt, dated 3/20/98) entered on doc# 76 (Branciforte, Ralph) (Entered: 03/24/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/02/1998	–	SEALED DOCUMENT as to Jacob Zedner (Ltr of Jacob Zedner dated 2/23/98 and attached original "so ordered" subpoena signed by Judge Platt on 2/25/98 addressed to the Dept of the Comptroller of the Currency, Treasury Dept., Washington, D.C.) (Mahon, Cinthia) (Entered: 03/04/1998)
04/15/1998	77	LETTER dated 4/15/98 from Tracey Gaffey to USDJ Platt RE: Requesting that Mr. Zedner's appearance at the 4/17/98 conference be waived for Passover observance. (Branciforte, Ralph) (Entered: 04/21/1998)
04/17/1998	78	MOTION by The Office of the Comptroller of the Currency as to Jacob Zedner to quash defendant's subpoena to "Department of the Comptroller of the Currency of the Treasury Department of the United States of America Washington, D.C. The subpoena requests a personal appearance and various documents which appear to relate to customer accounts at various financial institutions in the United States and other foreign Countries. (Branciforte, Ralph) (Entered: 04/21/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
04/17/1998	–	ENDORSED ORDER as to Jacob Zedner granting [78-1] motion to quash defendant's subpoena to "Department of the Comptroller of the Currency of the Treasury Department of the United States of America Washington, D.C. as to Jacob Zedner (1) (Judge Thomas C. Platt, dated 4/17/98) EOD # 78 CM (Branciforte, Ralph) (Entered: 04/21/1998)
04/17/1998	79	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 4/17/98 @ 9:30 AM for Criminal Cause For Conference. Defendant not present due to Religious Holiday. LAS Counsel Tracey Gaffey present. Govt: AUSA Leonard Lato. Court Reporter/ESR Ron Tolkin. Defendant's subpoenas are quashed by the Court. A trial date will be scheduled once the Court finishes its current trial. (Branciforte, Ralph) (Entered: 04/22/1998)
04/27/1998	80	PROCESS RECEIPT AND RETURN from the USMS as to Jacob Zedner RE: Subpoena served on the Department of the Comptroller of Currency, Treasury Department. (Branciforte, Ralph) (Entered: 04/28/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
07/08/1998	83	LETTER dated 7/8/98 from Jacob Zedner to USDJ Platt RE: Requesting for the second time that all documents from my file from the past and future be sealed. (Branciforte, Ralph) (Entered: 07/10/1998)
07/14/1998	–	SEALED DOCUMENT as to Jacob Zedner RE: Order to Show Cause submitted by Jacob Zedner and signed by USDJ Platt dtd. 7/14/98. (Branciforte, Ralph) (Entered: 07/16/1998)
07/27/1998	84	LETTER dated 7/27/98 from Jacob Zedner to USDJ Platt RE: Asking the Court not to Quash the Subpoenas issued for Citibank. (Branciforte, Ralph) (Entered: 07/27/1998)
07/27/1998	85	RETURN RECEIPT CARD as to Petra Pasheff from Jacob Zedner RE: Letter dtd. 7/22/98 – Compliance with subpoena. (P 148 876 285) (Branciforte, Ralph) (Entered: 07/28/1998)
07/27/1998	86	Letter MOTION by Citibank as to Jacob Zedner to quash any outstanding subpoenas and orders requiring Citibank, N.A. or any of its affiliates to produce documents, or requiring any Citibank employee to appear before the Court (Branciforte, Ralph) (Entered: 07/28/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
07/28/1998	–	ENDORSED ORDER as to Jacob Zedner granting [86-1] motion to quash any outstanding subpoenas and orders requiring Citibank, N.A. or any of its affiliates to produce documents, or requiring any Citibank employee to appear before the Court as to Jacob Zedner (1) (Judge Thomas C. Platt, dated 7/28/98) CM (Branciforte, Ralph) (Entered: 07/28/1998)
09/01/1998	87	Letter MOTION by Citibank as to Jacob Zedner to quash the subpoena dtd. 8/14/98 directed to "HEAD OFFICE, CITIBANK INTERNATIONAL NEW YORK, CITIBANK SINGAPORE BRANCH, CITIBANK TAIPEI BRANCH (R.O.C.) A.K.A. THE HUAQIBANK OF SINGAPORE A.K.A (CITIBABNK [sic] SINGAPORE BRANCH) International Banking Corporation/First National Bank of New York/First National City Bank" (Branciforte, Ralph) (Entered: 09/02/1998)
09/01/1998	88	LETTER dated 9/1/98 from Petra Tasheff to USDJ Platt RE: With respect to the Motion quash (doc# 87), there is no Citibank entity that goes by the name to which the subpoena is directed. (Branciforte, Ralph) (Entered: 09/02/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
09/01/1998	–	ENDORSED ORDER as to Jacob Zedner granting Citibank's [87-1] motion to quash the subpoena dtd. 8/14/98 directed to "HEAD CITIBANK INTERNATIONAL NEW YORK, CITIBANK SINGAPORE BRANCH, CITIBANK TAIPEI BRANCH (R.O.C.) A.K.A. THE HUAQIBANK OF SINGAPORE A.K.A (CITIBABNK [sic] SINGAPORE BRANCH) International Banking Corporation/First National Bank of New York/First National City Bank" as to Jacob Zedner (1) (Judge Thomas Platt, dated 9/1/98) EOD# 88 (Branciforte, Ralph) (Entered: 09/02/1998)
09/02/1998	89	LETTER dated 9/1/98 from Jacob Zedner to USDJ Platt RE: Requesting the court not to squash [sic] the impending subpoena based on the false accusations of Citibank's legal representative. (Branciforte, Ralph) (Entered: 09/04/1998)
09/08/1998	90	Letter MOTION by Citibank as to Jacob Zedner to quash the subpoena dtd. 8/14/98 directed to "HEAD OFFICE, CITIBANK INTERNATIONAL NEW YORK, CITIBANK SINGAPORE BRANCH, CITIBANK TAIPEI BRANCH (R.O.C.) A.k.a. THE HUAQIBANK OF SINGAPORE a.k.a. (CITIBANK SINGAPORE BRANCH) International

FILING DATE	DOCKET NUMBER	DESCRIPTION
		Banking Corporation/First National Bank of New York/First National City Bank" (original of doc# 87) (Branciforte, Ralph) (Entered: 09/09/1998)
09/08/1998	–	ENDORSED ORDER as to Jacob Zedner granting Citibank's [90-1] motion to quash the subpoena dtd. 8/14/98 directed to "HEAD CITIBANK INTERNATIONAL NEW YORK, CITIBANK SINGAPORE BRANCH, CITIBANK TAIPEI BRANCH (R.O.C.) A.k.a. THE HUAQIBANK OF SINGAPORE a.k.a. (CITIBANK SINGAPORE BRANCH) International Banking Corporation/First National Bank of New York/First National City Bank" as to Jacob Zedner (1) (Judge Thomas Platt, dated 9/8/98) EDO# 90 (Branciforte, Ralph) (Entered: 09/09/1998)
09/10/1998	91	Letter MOTION dtd. 9/1/98 by Citibank as to Jacob Zedner to quash the subpoena from Jacob Zedner dtd. 8/14/98 (Branciforte, Ralph) (Entered: 09/14/1998)
09/10/1998	–	ENDORSED ORDER as to Jacob Zedner granting Citibank's [91-1] motion to quash the subpoena from Jacob Zedner dtd. 8/14/98 as to Jacob Zedner (1) (Judge Thomas C. Platt, dated 9/10/98) EOD# 91 CM (Branciforte, Ralph) (Entered: 09/14/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
09/17/1998	92	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 9/17/98 @ 10:00 AM for Criminal Cause For Conference. Defendant Pro Se present – Legal Advisor LAS Counsel Tracey Gaffey present. Govt: AUSA Leonard Lato. Court Reporter/ESR Joe Barbella, setting jury selection for 9:30 10/14/98 for Jacob Zedner before Judge Thomas C. Platt Defendant's application to reduce the bond of $500,000.00 to $20,000.00 and oral motion to refinance his wife's house referred to Magistrate Judge who set bail originally. Defendant wishes to subpoena Citibank and Treasury Department. Subpoenas to be prepared made returnable on 9/24/98 @ 9:30 AM. Govt's motion to quash these subpoenas Denied. Court indicates someone from the bank will have to come in and testify. (Branciforte, Ralph) (Entered: 09/17/1998)
09/18/1998	93	NOTICE of Issuance of Subpoena by Jacob Zedner as to Madeline Albright, US Secretary of State; Robert Rubin, US Secretary of Treasury; US Senator Alfonse D'Amato; Mary Ellen Withdrow, Treasuser [sic] of the Treasury of

FILING DATE	DOCKET NUMBER	DESCRIPTION
		the United States of America and Treasury International Corporation; and Patrick Mass, Vice President and Resident Manager of Prudential Securities Incorporated & Ralph Raymond, Associate Vice President of Prudential Securities Incorporated in Garden City, NY. (Branciforte, Ralph) (Entered: 09/18/1998)
09/18/1998	94	LETTER dated 9/18/98 from Jacob Zedner to USDJ Platt RE: Requesting a Chinese Interpreter for the 9/24/98 conference before the Court. (Branciforte, Ralph) (Entered: 09/22/1998)
09/21/1998	95	LETTER dated 9/21/98 from Petra Tasheff to USDJ Platt RE: Requesting the Court quash the subpoena issued against John S. Reed and the subpoena dtd. 9/14/98 directed to "HEAD OFFICE, CITIBANK INTERNATIONAL, NEW YORK, CITIBANK SINGAPORE BRANCH, a.k.a. THE HUAQIBANK OF SINGAPORE BRANCH." (Branciforte, Ralph) (Entered: 09/25/1998)
09/22/1998	96	LETTER dated 9/22/98 from Petra Tasheff to USDJ Platt RE: I understand that Mr. Reed will not be required to appear at a hearing scheduled for this Thursday,

FILING DATE	DOCKET NUMBER	DESCRIPTION
		9/24/98. The appropriate representative to appear at a hearing regarding the recent subpoenas issued at Mr. Zedner's request is John Redding. However Mr. Redding is on vacation and will not be available until 10/5/98. (Branciforte, Ralph) (Entered: 09/25/1998)
09/24/1998	97	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 9/24/98 @ 9:30 AM for Criminal Cause For Hearing. Hearing withdrawn. Witness from Citibank on vacation hearing adjourned to 10/8/98 @ 9:30 AM (Branciforte, Ralph) (Entered: 09/29/1998)
09/24/1998	–	Status conference/Hearing as to Jacob Zedner set at 9:30 10/8/98 for Jacob Zedner before Judge Thomas C. Platt (Branciforte, Ralph) (Entered: 09/29/1998)
10/01/1998	98	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 10/1/98 @ 9:30 AM for Criminal Cause For Conference. Defendant not present. LAS Counsel for Defendant, Randi Chavis present. Govt: AUSA Leonard Lato. Court Reporter/ ESR Ron Tolkin. Conference held. setting status conference for

FILING DATE	DOCKET NUMBER	DESCRIPTION
		10/8/98 for Jacob Zedner before Judge Thomas C. Platt regarding the documents from the Treasury Department and Citibank and the subpoenas. (Branciforte, Ralph) (Entered: 10/01/1998)
10/02/1998	99	CONFERENCE TRANSCRIPT filed in case as to Jacob Zedner for dates of 10/1/98 @ 10:00 AM; Court Reporter/ESR: Ronald Tolkin (Branciforte, Ralph) (Entered: 10/06/1998)
10/04/1998	101	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 10/14/98 @ 9:30 AM for Criminal Cause For Jury Selection and Trial. Defendant Zedner appearing Pro Se with LAS Legal Advisor Tracey Gaffey. Govt: AUSA Leonard Lato. Court Reporter/ ESR Harry Rapaport. Hearing Held in chambers with AUSA Lato and LAS Gaffey. Court places its concerns on the record. Portion of hearing without Govt. present ordered sealed by the Court. Competency hearing held. Court orders defendant to be examined more extensively by a Govt. doctor pursuant to 28 USC 4241(d). Court's findings placed on the record. Court grants defendants

FILING DATE	DOCKET NUMBER	DESCRIPTION
		right to appeal this ruling and LAS Gaffey indicates that her office will represent The defendant on appeal. Jury trial until the Court of Appeals decides on the Court's decision on a competency exam. terminated past due deadlines (Branciforte, Ralph) Modified on 10/15/1998 (Entered: 10/14/1998)
10/08/1998	100	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 10/8/98 @ 9:30 AM for Criminal Cause For Hearing On Subpoenas issued by Defendant. Jacob Zedner appearing Pro Se with LAS Attorney Tracey Gaffey as legal advisor to defendant. Govt: AUSA Leonard Lato. Court Reporter/ESR Harry Rapaport. Other appearances: Prudential Securities: Justin Sacca; US Dept. of Treasury: James Kramer-Wilt; Citibank: Petra Tasheff. Chinese Interpreter John Lau present to translate documents. Hearing begun IN CAMERA in jury room without presence of Govt. as ordered. Court reporter present and taking the minutes. Witnesses examined. Parties appear in Courtroom as 11:00 AM for ruling. Transcript of proceedings

FILING DATE	DOCKET NUMBER	DESCRIPTION
		ordered sealed by the Court. setting jury selection for 9:30 10/14/98 for Jacob Zedner before Judge Thomas C. Platt (Branciforte, Ralph) (Entered: 10/09/1998)
10/14/1998	102	Exhibit list by USA as to Jacob Zedner used for Hearing on 10/14/98 before USDJ Platt (Branciforte, Ralph) (Entered: 10/14/1998)
10/14/1998	103	Exhibit list by Jacob Zedner as to Jacob Zedner used for Hearing on 10/14/98 before USDJ Platt (Branciforte, Ralph) (Entered: 10/14/1998)
10/14/1998	106	Exhibit #32 by USA as to Jacob Zedner RE: Letter dtd. 5/2/97 from AUSA Leonard Lato to USDJ Platt providing notice that the Govt intends to introduce at trial, evidence of Mr. Zedner's other crimes, wrongs, and acts. (Branciforte, Ralph) (Entered: 10/19/1998)
10/15/1998	104	HEARING TRANSCRIPT filed in case as to Jacob Zedner for dates of 10/14/98 @ 9:30 AM; Court Reporter/ESR: Harry Rapaport (portion sealed) (Branciforte, Ralph) (Entered: 10/15/1998)
10/15/1998	–	SEALED DOCUMENT as to Jacob Zedner RE: Portion of Hearing Transcript conducted on 10/14/98

FILING DATE	DOCKET NUMBER	DESCRIPTION
		(pp. 15-17) before USDJ Platt. (Branciforte, Ralph) (Entered: 10/15/1998)
10/15/1998	–	SEALED DOCUMENT as to Jacob Zedner RE: Portion of Hearing Transcript conducted on 10/8/98 before USDJ Platt (pp. 1-61). (Branciforte, Ralph) (Entered: 10/15/1998)
10/15/1998	105	HEARING TRANSCRIPT filed in case as to Jacob Zedner for date of 10/8/98 @ 2:00 PM; Court Reporter/ ESR: Harry Rapaport (pp. 62-71) (Branciforte, Ralph) (Entered: 10/15/1998)
10/15/1998	–	SEALED DOCUMENT as to Jacob Zedner RE: Letter dtd. 10/15/98 from J. Kelley Nevling, Jr., Citibank, to USDJ Platt. (Branciforte, Ralph) (Entered: 10/19/1998)
10/19/1998	107	MEMORANDUM & ORDER as to Jacob Zedner: That the defendant be committed to the custody of the Attorney General for hospitalization and treatment in a suitable facility pursuant to 18 USC 4241(d). (Signed by Judge Thomas C. Platt dated: 10/19/98) CM (Branciforte, Ralph) (Entered: 10/20/1998)

FILING DATE	DOCKET NUMBER	DESCRIPTION
10/19/1998	108	ORDER That the defendant, Jacob Zedner be committed to the custody of the Attorney General, who shall hospitalize the defendant for a Psychiatric Exam pursuant to 18 USC 4241(d)(1) (Signed by Judge Thomas C. Platt, dated: 10/19/98) (Branciforte, Ralph) (Entered: 10/20/1998)
10/26/1998	109	NOTICE OF INTERLOCUTORY APPEAL by Jacob Zedner re [108-1] order for a Psychiatric Exam pursuant to 18 USC 4241(d)(1) Notice of Appeal, certified copy of order appealed from and certified copy of docket sheet forwarded to USCA. No fee paid. (Jafer, Halide) (Entered: 10/27/1998)
11/18/1998	112	SUPPLEMENTAL MEMORANDUM & ORDER as to Jacob Zedner That the Psychiatric Exam ordered on 10/19/98 is further supported by the Affidavit of US Pretrial Services Officer Patrick L. Mancini, annexed hereto, which has been called to the Court's attention. (Signed by Judge Thomas C. Platt, dated: 11/18/98) (affidavit annexed) (Branciforte, Ralph) (Entered: 11/25/1998)
11/20/1998	111	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 11/20/98

FILING DATE	DOCKET NUMBER	DESCRIPTION
		@ 9:30 AM for Criminal Cause for Govt's Application To Revoke Bail. Defendant Zedner, Pro Se, present with Legal Advisor Tracey Gaffey. Govt: Leonard Lato. Court Reporter/ESR Carolyn Barna. Govt's application to revoke bail heard and denied for reasons stated on the record. Court indicated it would wait and see outcome of defendant's pending criminal Queens County State Court case scheduled for 12/10/98. Briefing schedule has been set in Court of Appeals with respect to defendant's appeal in this case, but no argument date yet. (Branciforte, Ralph) (Entered: 11/25/1998)
04/23/1999	115	CONFERENCE TRANSCRIPT filed in case as to Jacob Zedner for dates of 5/2/97 @ 9:30 AM; Court Reporter/ESR: Ronald Tolkin (Branciforte, Ralph) (Entered: 04/23/1999)
10/26/1999	116	USCA Mandate as to Jacob Zedner re: [109-1] Interlocutory Appeal. Vacating the order of the District Court and Remanding for further proceedings. Copy of Mandate forwarded to Chambers for review. (Coleman, Laurie) (Entered: 10/26/1999)

FILING DATE	DOCKET NUMBER	DESCRIPTION
04/04/2000	119	CALENDAR ENTRY as to Jacob Zedner; Case called before Judge Thomas C. Platt on date of 4/4/00 at 9:30 a.m. for Criminal for Competency Hearing. Court Reporter/ ESR Dom Tursi. Only AUSA Gary Brown present. Reset status conference for 9:30 4/27/00 for Jacob Zedner before Judge Thomas C. Platt (Coleman, Laurie) (Entered: 04/07/2000)
04/06/2000	118	LETTER dated 4/3/00 from Tracey Gaffey, Associate Attorney (Legal Aid) to Judge Platt re: request that our appearance tomorrow be postponed. I have not gotten a new mental evaluation completed for the competency hearing, and Mr. Lato is still on trial. (Coleman, Laurie) (Entered: 04/06/2000)
04/27/2000	120	CALENDAR ENTRY before Judge Platt on 4/27/00 at 9:30 a.m. as to Jacob Zedner; for Criminal Cause for Competency Court Reporter/ ESR Mary Misiti Gov't: AUSA Leonard Lato Deft. Jacob Zedner, Pro se & Tracey Gaffey (LAS) to assist deft. Edward Zas (LAS) Appeals Bureau Ms. Gaffey to confirm in writing of proceedings to Mr. Zedner set competency hearing for 9:30 7/10/00, or for all submissions, to be determined in future,

FILING DATE	DOCKET NUMBER	DESCRIPTION
		for Jacob Zedner before Judge Thomas C. Platt (Coleman, Laurie) (Entered: 05/01/2000)
07/10/2000	121	CALENDAR ENTRY as to Jacob Zedner present; Case called before Judge Thomas C. Platt on date of 7/10/00 for Criminal competency hearing. AUSA Leonard Lato. Tracey Gaffey to assist Pro se deft. Court Reporter Jennifer Maue. Hearing held. Deft's witness Dr. Sanford Drob sworn and testifies. Parties are to file briefs on how they want the court to proceed in this case. Deft. to file his brief on 8/4/00. Govt. to file brief on 8/11/00. (O'Hara, Karen) (Entered: 07/13/2000) (O'Hara, Karen) (Entered: 07/13/2000)
07/18/2000	122	TRANSCRIPT filed in case as to Jacob Zedner for dates of 7/10/00; Court Reporter: Jennifer Maue (O'Hara, Karen) (Entered: 07/18/2000)
08/11/2000	125	LETTER dated 8/11/00 from Leonard Lato to Judge Platt re: in support of its position that the defendant Jacob Zedner is presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial. (O'Hara, Karen) (Entered: 08/30/2000)

FILING DATE	DOCKET NUMBER	DESCRIPTION
08/21/2000	123	TRANSCRIPT filed in case as to Jacob Zedner for dates of 10/14/98; Court Reporter: H. Rapaport (O'Hara, Karen) (Entered: 08/21/2000)
08/23/2000	124	MEMORANDUM by Jacob Zedner in support of defendant's competency to stand trial. (O'Hara, Karen) (Entered: 08/23/2000)
03/07/2001	126	MOTION by Jacob Zedner to dismiss the indictment with prejudice pursuant to the Speedy Trial Act (Valle, Christine) (Entered: 03/12/2001)
03/07/2001	127	MEMORANDUM by Jacob Zedner in support of the [126-1] motion to dismiss the indictment with prejudice pursuant to the Trial Act (Valle, Christine) (Entered: 03/12/2001)
03/07/2001	129	LETTER dated 3/5/01 from Edward S. Zas to Judge Platt Re: copies of the notice of motion to dismiss and supporting papers. (Imrie, Robert) (Entered: 03/26/2001)
03/07/2001	133	MEMORANDUM by Jacob Zedner in support of the [126-1] motion to dismiss the indictment with prejudice pursuant to the Trial Act. (Imrie, Robert) (Entered: 04/04/2001)

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/21/2001	128	MEMORANDUM ORDER as to Jacob Zedner denying [126-1] motion to dismiss the indictment with prejudice pursuant to the Speedy Trial Act as to Jacob Zedner (1), Set Sentencing for 3/30/01 at 9:30 a.m. before Senior Judge Thomas C. Platt (Signed by Senior Judge Thomas C. Platt, on 3/21/01) c/m (Imrie, Robert) (Entered: 03/23/2001)
03/22/2001	130	RESPONSE by USA as to Jacob Zedner in opposition to [126-1] motion to dismiss the indictment with prejudice pursuant to the Speedy Trial Act (Branciforte, Ralph) (Entered: 03/29/2001)
03/22/2001	131	AFFIDAVIT by Leonard Lato in opposition to [126-1] motion to dismiss the indictment with prejudice pursuant to the Trial Act (Branciforte, Ralph) (Entered: 03/29/2001)
03/28/2001	135	LETTER dated 3/28/01 from Edward S. Zas to Judge Platt Re: requesting the court to issue a stay, pending appeal, of its Memorandum and Order, dated 3/21/01. (Imrie, Robert) (Entered: 04/04/2001)
03/28/2001	137	NOTICE OF INTERLOCUTORY APPEAL by Jacob Zedner re [128-1] order Set Sentencing for

FILING DATE	DOCKET NUMBER	DESCRIPTION
		3/30/01 at 9:30 a.m. before Senior Judge Thomas C. Platt. Notice of appeal, certified copy of order and certified copy of docket sent to USCA. Copy of notice of appeal forwarded to chambers for review. (Lopez, Luz) Modified on 04/06/2001 (Entered: 04/06/2001)
03/29/2001	132	LETTER dated 3/29/01 from Leonard Lato to Judge Platt Re: in opposition to Jacob Zedner's motion for a stay, pending appeal of the Court's order committing him to the custody of the Attorney General for hospitalization and treatment in a suitable facility. (Imrie, Robert) (Entered: 04/03/2001)
03/29/2001	134	LETTER dated 3/29/01 from Leonard Lato to Judge Platt Re: in opposition to Jacob Zedner's motion for a stay pending appeal of the Court's Order committing him to the custody of the Attorney General for the hospitalization and treatment in a suitable facility. (Imrie, Robert) (Entered: 04/04/2001)
03/30/2001	136	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 3/30/01 at 9:30 a.m. for Cr Cause for Conference Court Reporter/ESR O. Wicker Deft Zedner present

FILING DATE	DOCKET NUMBER	DESCRIPTION
		Pro Se and by LAS counsel Edward Zas; Govt: AUSA Leonard Lato. Case called. Deft and counsel for all sides present. Parties discuss the memo and order of the Court and the stay in the 2nd Circuit. The Court puts relevant events on the record. Govt and Deft put discussions on the record. Court exhibit #1-letter dated 3/22/01 by AUSA Lato marked into evidence. (annexed) (Imrie, Robert) (Entered: 04/04/2001)
04/05/2001	138	USCA Order that the motion for Stay be granted only to the extent that the District Court's order is stayed until April 20, 2001. Copy forwarded to chambers for review. (Lopez, Luz) (Entered: 04/06/2001)
04/25/2001	140	USCA Order for a stay pending appeal. The government does not oppose this request. Copy forwarded to chambers for review. (Lopez, Luz) (Entered: 04/25/2001)
06/11/2001	142	TRANSCRIPT OF CONFERENCE filed in case as to Jacob Zedner for dates of 11/8/96 at 9:30AM before Judge Thomas C. Platt; Court Reporter: Owen M. Wicker. (Valle, Christine) (Entered: 06/11/2001)

FILING DATE	DOCKET NUMBER	DESCRIPTION
03/12/2001	145	LETTER dated 3.11.02 from Tracy Gaffey to USDJ Platt re: Requesting that the Court rescind its order of commitment or in the alternative, shorten the period of commitment to thirty days. (Lopez, Luz) (Entered: 04/10/2002)
03/21/2002	143	USCA Mandate on Interlocutory Appeal as to Jacob Zedner re: It is hereby ordered, adjudged and decreed that the judgment of the District Court be and it hereby is affirmed. Copy of mandate forwarded to Chambers for review. (Duong, Susan) (Entered: 03/22/2002)
03/21/2002	146	LETTER dated 3.20.02 from Leonard Lato to USDJ Platt re: Opposition to letter motion [145-1] asking Court to rescind its order of commitment. The govt requests that the court schedule a conference at 11:00 on March 22 at which time the Govt will request that the US Marshal take custody of Zedner in accordance to the commitment Order. (Lopez, Luz) (Entered: 04/10/2002)
03/22/2002	144	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 3/22/02 @ 11:00 a.m. for Conference. Defendant Zedner (Pro Se) present

FILING DATE	DOCKET NUMBER	DESCRIPTION
		with Federal Defender Counsel Tracey Gaffey. Govt: AUSA Leonard Lato. The Defendant is to surrender on 4/5/02 before noon. The Defendant is to be released 30 days after he arrives at the examining facility. (Branciforte, Ralph) (Entered: 03/25/2002)
04/01/2002	147	ORDER as to Jacob Zedner, The dft is commited to the custody of the Attorney General, who shall hospitalize the dft for Treatment in a suitable facility – (1) for such a reasonable period of time, not to exceed 30 days measured from the date the dft arrives at the facility, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and (2) for an additional reasonable period of time, not to exceed 30 days, upon notice to the Court that such additional reasonable period of time is required. The dft is directed to surrender to the US Marshal at 12 noon on 4/5/02. (Signed by Senior Judge Thomas C. Platt, on 4.1.02)cm (Lopez, Luz) (Entered: 04/10/2002)
04/01/2002	148	LETTER dated 4.01.02 from Jacob Zedner to USDJ Platt re: I am requesting from the Court a 10 day

FILING DATE	DOCKET NUMBER	DESCRIPTION
		delay to surrender. (Lopez, Luz) (Entered: 04/10/2002)
05/24/2002	150	LETTER dated 5/21/02 from A.F. Beeler, Warden, FMC Butner to USDJ Platt RE: Mr. Zedner was admitted on 5/1/02. Requesting that the evaluation period begin on the date of arrival and be extended for a full 120 days, as allowed by the statute (18 USC 4241(d)). (Branciforte, Ralph) (Entered: 05/30/2002)
05/24/2002	–	ENDORSED ORDER on [150-1] letter: Application granted. (Signed by Senior Judge Thomas C. Platt, on 5/24/02) EOD# 150 CM (Branciforte, Ralph) (Entered: 05/30/2002)
05/31/2002	151	Letter MOTION by Jacob Zedner to extend time, for comprehensive psychological evaluation ending on 8/27/02 [151-1] motion, [151-2] motion (Barhome, Sydelle) (Entered: 06/05/2002)
05/31/2002	–	ENDORSED ORDER as to Jacob Zedner granting [151-1] motion to extend time as to Jacob Zedner (1) granting [151-2] motion for comprehensive psychological evaluation ending on 8/27/02 as to Jacob Zedner (1) (Signed by Senior Judge Thomas C. Platt, on 5/31/02) (Barhome, Sydelle) (Entered: 06/05/2002)

FILING DATE	DOCKET NUMBER	DESCRIPTION
06/14/2002	152	LETTER dated 6.7.02 from Jacob Zedner to Tracey Gaffey re: requesting for you to put in a motion to get copies of the minutes and signatures of the grand jury. (Lopez, Luz) (Entered: 06/26/2002)
07/17/2002	153	LETTER dated 7.17.02 from USDJ Platt to Warden at Federal Medical Center in Butner, NC. re: Detainee has written a letter stating that his bond, which was posted for his release on bail, is still in full force and effect. Having checked, my courtroom clerk has advised that the bond is still in effect. (Lopez, Luz) (Entered: 07/24/2002)
10/03/2002	154	LETTER dated 9.30.02 from Jacob Zedner to USDJ Platt re: The Bureau of prisons promised to return personal and religious items to my wife. until this day, none of my possessions have been returned. (Lopez, Luz) (Entered: 10/28/2002)
12/31/2002	155	Letter MOTION by Jacob Zedner Requesting Modification of bail Conditions and that the bond be modified to an unsecured bond so that we may remove the liens against the two properties. (Lopez, Luz) (Entered: 01/07/2003)

FILING DATE	DOCKET NUMBER	DESCRIPTION
12/31/2002	–	ENDORSED ORDER as to Jacob Zedner granting [155-1] motion Requesting Modification of bail Conditions and that the bond be modified to an unsecured bond so that we may remove the liens against the two properties as to Jacob Zedner (1) (Signed by Senior Judge Thomas C. Platt, on 12.31.02) eod#155 cm (Lopez, Luz) (Entered: 01/07/2003)
04/02/2003	158	LETTER dated 4.2.03 from AUSA: Leonard Lato to USDJ Platt re: Requesting a status conference on 4/3/03. At the conference, the government will move to dismiss the indictment without prejudice. If the court grants the motion, the government will ask a grand jury to re-indict. (Lopez, Luz) (Entered: 04/08/2003)
04/03/2003	157	LETTER dated 4.2.0.3 from Tracey Gaffey Esq. to USDJ Platt re: Writing to oppose the government's intention to introduce evidence of Mr. Zedner's other crimes, wrongs and acts when Zedner claims that he acted with lawful intent. (Lopez, Luz) (Entered: 04/08/2003)
04/03/2003	159	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.3.03 at 10:30 am. for Conference. Dft present with LAS

FILING DATE	DOCKET NUMBER	DESCRIPTION
		Counsel Tracy Gaffey. AUSA: Leonard Lato. trial set for 4/7/03 at 9:30 am. The gov will supersede the indictment dropping 2 counts. The speedy trial issue is addressed: the government is not dismissing the indictment b/c the speedy trial issue will still be present. The dft is not renewing a motion to dismiss that was previously denied by the Court. The court will wait until opening statements to decide on the 404 (b) question to see what the defense and prosecution plan to offer. Dfts witness Dr. Drob may be held up on another trial, defense counsel will communicate with the Court to finalize testimony plans. The parties have stipulated that his testimony may be taken out of turn. (Lopez, Luz) (Entered: 04/08/2003)
04/07/2003	156	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.7.03 for Jury Trial. Jury trial begins, opening statements heard. Witnesses sworn, testimony heard. Scheduling Jury trial for 9:30 4/8/03 for Jacob Zedner before Senior Judge Thomas C. Platt The government dismissed counts 3 and 8 of the indictment. So Ordered. The govt moves to alter the indictment on

FILING DATE	DOCKET NUMBER	DESCRIPTION
		paragraph 9 to strike out "were counterfeit and", So Ordered. (Lopez, Luz) (Entered: 04/08/2003)
04/08/2003	160	Jury trial as to Jacob Zedner held (Lopez, Luz) (Entered: 04/09/2003)
04/08/2003	161	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.8.03 at 9:30 for Jury Trial. Dft present on bond with LAS counsel Tracey Gaffey. AUSA: Leonard Lato. C/R: Harry Rapaport. Jury trial resumes. Stipulation entered on the record indicating that representatives from the FDIC and the SEC if called would testify that the financial institution victims are member of either administration. Witnesses sworn and testify. Setting Jury trial for 2:00 4/11/03 for Jacob Zedner before Senior Judge Thomas C. Platt (Lopez, Luz) (Entered: 04/09/2003)
04/11/2003	162	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.11.03 at 2:00 pm. for Jury Trial. Dft present on bond with LAS counsel Tracy Gaffey. AUSA: Leonard Lato. C/R: Harry Rapaport. Jury trial resumes. Government rests. Dft puts on sworn witness. Defense rests. Government puts on

FILING DATE	DOCKET NUMBER	DESCRIPTION
		rebuttal witnesses. Witnesses sworn, testimony heard. Government rests Scheduling closing arguments and charge for 9:00 4/14/03 before Senior Judge Thomas C. Platt (Lopez, Luz) (Entered: 04/17/2003)
04/14/2003	163	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.14.03 for Jury Trial. Dft present with LAS counsel Tracey Gaffey. AUSA: Leonard Lato. C/R: Owen Wicker/H. Rapaport. Closing arguments heard. Jury read charge. Court security officer sworn. Jury deliberates. Alternate Jurors 3-6 dismissed. The jurors still have not reached a unanimous verdict. Juror#8 is dismissed on consent of all parties because of a family emergency on 4/15/03. Alternate #1 takes her place. Setting Jury deliberations for 9:00 4/15/03 for Jacob Zedner before Senior Judge Thomas C. Platt (Lopez, Luz) (Entered: 04/17/2003)
04/15/2003	164	CALENDAR ENTRY as to Jacob Zedner; Case called before Senior Judge Thomas C. Platt on date of 4.15.03 at 9:30 am. for Jury Trial. Dft present with LAS counsel Tracey Gaffey. AUSA: Leonard Lato. C/R: Owen Wicker. Jury

FILING DATE	DOCKET NUMBER	DESCRIPTION
		deliberates. Jury informs the court they have a unanimous verdict. Jury verdict Guilty on counts 1,2, 4-7. The gov. dismissed counts 3 & 8 at the beginning of the trial. Jury Polled. Jury released. The dft will submit motions in writing. The gov moves to detain the dft based on the outcome of the jury trial, his risk of flight and prior criminal history. The dft asks for an increased bail package . The application is opposed by the gov. the court denies the application and grants the gov request. The dft is remanded into custody and informed of his right to appeal. probation notified and to prepare an expedited report. (Lopez, Luz) (Entered: 04/17/2003)
04/15/2003	–	JURY VERDICT as to Jacob Zedner Guilty: Jacob Zedner (1) count(s) 1-2, 4-7 (Lopez, Luz) (Entered: 04/18/2003)
04/15/2003	165	Exhibit and witness list as to Jacob Zedner (Lopez, Luz) (Entered: 04/18/2003)
04/25/2003	166	TRANSCRIPT filed in case as to Jacob Zedner for dates of 4.11.03 at 2:00 pm.; Criminal cause for trial. Court Reporter/ESR: Harry Rapaport. (Lopez, Luz) (Entered: 04/25/2003)

FILING DATE	DOCKET NUMBER	DESCRIPTION
07/31/2003	168	Minute Entry for proceedings held before Thomas C. Platt Status Conference as to Jacob Zedner held on 7/31/2003 at 9:30 am. Criminal cause for sentence adjournment. AUSA Burton Ryan present. Court Reporter: Ellen Combs. Sentencing adjourned to 8/25/03 at 9:30 am. (Lopez, Adriana) (Entered: 08/07/2003)
08/20/2003	169	MOTION for Psychiatric Exam *of dft and that a psychiatric report be filed with the Court. Filed* by Jacob Zedner. (Lopez, Adriana) (Entered: 09/08/2003)
08/20/2003	170	DECLARATION OF Tracey Gaffey in Support of the [169] MOTION for Psychiatric Exam *of dft and that a psychiatric report be filed with the Court. (Lopez, Adriana) (Entered: 09/08/2003)*
08/25/2003	171	Minute Entry for proceedings held before Judge Thomas C. Platt: Status Conference as to Jacob Zedner held on 8/25/2003. Dft present with Counsel Tracey Gaffey. AUSA: Wayne Baker. Defense counsel has filed a motion for a psychiatric examination. The dft issues a statement opposing this motion. The govt. opposes the motion. The court rules that defense counsel can hire a psychiatrist of their own choice and pay out of the CJA funds

FILING DATE	DOCKET NUMBER	DESCRIPTION
		but the court will not grant the motion as presented. Set hearing or status conference for 9/26/03 at 9:30 am. (Court Reporter Paul Lombardi.) (Lopez, Adriana) (Entered: 09/08/2003)
09/16/2003	172	TRANSCRIPT of Proceedings as to Jacob Zedner held on 8/25/03 at 9:45 am before Judge USDJ PLATT. Court Reporter: Paul Lombardi. (Lopez, Adriana) (Entered: 09/24/2003)
09/18/2003	173	ORDER – Is Ordered that Dr. Sanford Drob be allowed to examine Jacob Zedner in a private room or area in the Nassau County Correctional Center. Signed by Judge Thomas C. Platt on 9/18/03. cm (Lopez, Adriana) (Entered: 09/25/2003)
09/26/2003	174	Minute Entry for proceedings held before Thomas C. Platt: Status Conference as to Jacob Zedner called before Senior Judge Thomas C. Platt on date of 10/3/03 at 9:30 am. Criminal cause for sentence adjournment. AUSA: Wayne Baker present. Tracey Gaffey present Court Reporter: Harry Rapaport. Sentencing adjourned to 11/14/03 at 9:30 am. (Lopez, Adriana) (Entered: 10/20/2003)

FILING DATE	DOCKET NUMBER	DESCRIPTION
11/14/2003	179	Minute Entry for criminal cause for sentencing held before Thomas C. Platt: Docket Call as to Jacob Zedner held on 11/14/2003 at 9:30 A.M. Counsel for the government, A.U.S.A. Burton Ryan, present. Sentencing adjourned to 12/3/2003 at 1:30 P.M. before Senior Judge Thomas C. Platt. (Court Reporter Mary Ann Steiger.) (Dachille, Patti) (Entered: 12/01/2003)
11/17/2003	175	TRANSCRIPT of criminal cause on trial as to Jacob Zedner held on 4/7/03 at 9:40 a.m. before Judge Hon. Thomas C. Platt and a jury. Court Reporter: Harry Rapaport. (Dachille, Patti) (Entered: 11/21/2003)
11/17/2003	176	TRANSCRIPT of criminal cause on trial as to Jacob Zedner held on 4/8/03 at 9:45 a.m. before Judge Hon. Thomas C. Platt and a jury. Court Reporter: Harry Rapaport. (Dachille, Patti) (Entered: 11/21/2003)
11/17/2003	177	TRANSCRIPT of criminal cause on trial as to Jacob Zedner held on 4/11/03 at 2:00 p.m. before Judge Hon. Thomas C. Platt and a jury. Court Reporter: Harry Rapaport. (Dachille, Patti) (Entered: 11/21/2003)

FILING DATE	DOCKET NUMBER	DESCRIPTION
01/09/2004	180	Minute Entry for sentencing proceedings held before Thomas C. Platt on 1/9/04 @ 9:30: AUSA Stephen King Tracy Gaffey Sentencing adjourned to 1/15/2004 01:30 PM before Senior Judge Thomas C. Platt. The dft made a motion for downward departure. Motion denied for insufficient grounds. Hearing on the amount of loss: whether it was 2 bonds or 4. The dft withdraws his request for a hearing but the court feels a hearing must be held regarding this issue. (Court Reporter Perry Auerbach.) (Barhome, Sydelle) (Entered: 01/14/2004)
01/22/2004	181	Minute Entry for proceedings held before Thomas C. Platt: sentencing held on 1/22/2004 @ 2:00 PM for Jacob Zedner (1), Count(s) 1-2, 4-7. Dft present in custody with PDA counsel Tracey Gaffey. Gov't: Stephen King Probation: Nicole Pizzo. Statements of Dft and counsel heard. Dft is sentenced to a term of imprisonment of 63 months on each count to run concurrent with credit for time served. To be followed by five years of supervised release. Dft is remanded to the custody of the US Marshal. Special Assessment is imposed in the sum of $300.00 Dft is advised of his right to appeal. Dft moves for bail pending appeal.

FILING DATE	DOCKET NUMBER	DESCRIPTION
		Motion denied. The Court also advises the parties they may make a Rule 35 motion if they find case law regarding the issues presented prior to trial in Section 2F1.1 of the sentencing guidelines. (Court Reporter D. Tursi.) (Barhome, Sydelle) (Entered: 02/03/2004)
01/23/2004	182	JUDGMENT as to Jacob Zedner (1), Count(s) 1-2, 4-7. Dft was found guilty on Counts 1,2,4,5,6 &7 after a plea of not guilty. Dft is commited to the custody of the USBOP to be imprisoned for 63 months on each count to run concurrent with credit for time served and for time in the custody of the BOP for psychiatric evaluations. The dft is remanded to the custody of the US Marshal. Dft shall be on Supervised release five years. Special Assessment of $300 Count(s) 3, 8, Dismissed on the motion of the United States at the beginning of trial. Signed by Judge Thomas C. Platt on 1/23/04. (Barhome, Sydelle) (Entered: 02/03/2004)
01/26/2004	183	NOTICE OF APPEAL by Jacob Zedner re [182] Judgment, Copy of notice of appeal, copy of judgment and certified copy of the docket sheet forwarded to USCA. Copy of notice of appeal sent to Chambers. Service made by Clerk's Office. (Duong, Susan) (Entered: 02/12/2004)

FILING DATE	DOCKET NUMBER	DESCRIPTION
02/24/2004	184	Letter dtd. 1/20/04 from Tracey L. Eadie Gaffey, Esq., to Clerk, EDNY CI noting enclosure of documents for filing: competency Evaluation of Sandord L. Drob, PhD; 12/29/03 objection/sentencing letter from Tracey Gaffey, Esq; 9/25/03 objection letter from Tracey Gaffey, Esq.; Letter of Tami Zada. (Barhome, Sydelle) (Entered: 03/01/2004)
02/24/2004	187	Letter dtd. 9/25/03 from Tracey L. Eadie-Gaffey, Esq. to Hon. J. Platt of Competency Evaluation of Sanford L. Drob, PhD. (Barhome, Sydelle) (Entered: 03/01/2004)
02/24/2004	186	Letter from Tracey L. Eadie Gaffey, Esq. to Hon. J. Platt: December 29, 2003 objection/sentencing as to Jacob Zedner. (Barhome, Sydelle) (Entered: 03/01/2004)
02/24/2004	185	NOTICE: Competency Evaluation of Jacob Zedner written by Sanford L. Drob, Ph.D., on 9/12/03 (Barhome, Sydelle) (Entered: 03/01/2004)
02/24/2004	188	Letter dtd. 1/22/04 from Tami Zada to Hon. J. Platt noting her loving relationship to her father. (Barhome, Sydelle) (Entered: 03/01/2004)
03/15/2004	190	ORDER of USCA (certified copy) as to Jacob Zedner re [183] Notice of Appeal – Final Judgment. It is

FILING DATE	DOCKET NUMBER	DESCRIPTION
		hereby ordered that the motion for bail is denied and the appeal expedited. Appellant shall file a brief and appendix by 3/30/2004; appellee shall file a brief by 4/20/2004; appeal shall be heard the week of 4/26/2004, subject to the approval of the presiding judge. Copy of order forwarded to chambers for review. (Basile, Antonietta) (Entered: 04/20/2004)
03/26/2004	191	Acknowledgment from USCA received as to the receipt of the designation of the index to the record on appeal as to Jacob Zedner for [183] Notice of Appeal – Final Judgment filed by Jacob Zedner. USCA# 04-0821. (Basile, Antonietta) (Entered: 04/20/2004)
04/14/2004	192	Proposed Jury Instructions by Jacob Zedner (Lopez, Adriana) (Entered: 05/21/2004)
06/09/2005	193	MANDATE of USCA (certified copy): It is hereby ORDERED, ADJUDGED and DECREED that the judgment of conviction is AFFIRMED. Sentence VACATED and REMANDED for resentencing in accordance with the opinion of this court as to Jacob Zedner re [183] Notice of Appeal – Final Judgment (Attachments: # *1* Opinion). Copy of mandate sent to Chambers. USCA#

FILING DATE	DOCKET NUMBER	DESCRIPTION
		04-0821-cr. (Duong, Susan) (Entered: 06/14/2005)
10/27/2005	194	MEMORANDUM & ORDER: Dft has shown no sign of remorse or contriteness for what he has done or has tried to do. If the dft is produced for resentence, the Court intends to reimpose the sentence of sixty-three (63) months that the Court imposed on January 22, 2004. Ordered by Judge Thomas C. Platt on 10/27/05. (Barhome, Sydelle) (Entered: 10/28/2005)
10/31/2005	195	NOTICE OF APPEAL (Zas, Edward) (Entered: 10/31/2005)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 04-0821-cr

UNITED STATES OF AMERICA, Appellee,

v.

JACOB ZEDNER, Defendant-Appellant.

FILING DATE	DESCRIPTION
2/18/04	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Jacob Zedner, filed. [SM]
2/23/04	Appellant Jacob Zedner motion for bail filed with proof of service. [SM]
2/24/04	Scheduling order #1 filed. Record on appeal due 3/15/2004. Appellants brief due 4/14/2004. Appellees brief due 5/14/2004. Anders response due 4/28/2004. Ready week 6/28/2004. [SM]
2/24/04	Notice to counsel re: scheduling order #1. [SM]
2/25/04	Declaration in support of the motion for bail filed with proof of service. [SM]
3/4/04	Government's response in opposition to motion for bail filed with proof of service. [SM]
3/10/04	Notice to counsel re: order filed 3/10/04. [SM]
3/10/04	Certified copy of the order, dated 3/10/2004 issued to the district court. [SM]
3/10/04	Scheduling order #1 filed. Appellants brief due 3/30/2004. Appellees brief due 4/20/2004. Ready week 4/26/2004. (See order filed 3/10/04) Before Hon. JMW, RJC, CJS.
3/10/04	Order FILED DENYING motion for bail by Appellant Jacob Zedner, endorsed on motion

FILING DATE	DESCRIPTION
	dated 2/23/2004. EXPEDITED APPEAL, Appellant shall file a brief and appendix by March 30, 2004; appellee shall file a brief by April 20, 2004; appeal shall be heard the week of April 26, 2004, subject to the approval of the presiding judge. Before Hon. JMW, RJC, CJS. (AH) [SM]
3/30/04	APPELLANT Jacob Zedner, brief RECEIVED. (Oversized. motion pending) [SM]
3/30/04	APPELLANT Jacob Zedner, appendix received. (motion pending) [SM]
3/30/04	Appellant Jacob Zedner motion for leave to file oversized brief filed with proof of service. [SM]
3/31/04	APPELLANT Jacob Zedner, sealed pre-sentence report received. [SM]
4/5/04	Notice to counsel re: order granting motion to file oversized brief. [AV]
4/5/04	Appellant Jacob Zedner brief FILED with proof of service. [AV]
4/5/04	**CORRECTED** appellant Zedner brief FILED with proof of service. [AV]
4/5/04	Appellant Jacob Zedner appendix vol. 1 filed w/pfs. [AV]
4/5/04	Appellant Jacob Zedner appendix vol. 2 filed w/pfs. [AV]
4/5/04	Order FILED GRANTING motion for leave to file oversized brief by Appellant Jacob Zedner, endorsed on motion dated 3/30/2004 (FOR THE COURT-AV). [AV]
4/8/04	APPELLANT Jacob Zedner, Record on appeal index in lieu of record filed. [SM]

FILING DATE	DESCRIPTION
4/20/04	APPELLEE United States of America, brief filed with proof of service. [SM]
4/26/04	APPELLANT Jacob Zedner, reply brief filed with proof of service. [SM]
4/28/04	Case heard before LEVAL, RAGGI, C.JJ, STEIN, D.J. [JC]
6/28/04	APPELLANT Jacob Zedner, 28(J) letter FILED. [SM]
7/8/04	APPELLANT Jacob Zedner, supplemental brief RECEIVED. (motion pending) [SM]
7/8/04	Appellant Jacob Zedner motion to file supplemental brief filed with proof of service. [SM]
7/21/04	Notice to counsel re: motion order filed 7/21/04. [SM]
7/21/04	APPELLANT Jacob Zedner, supplemental brief filed with proof of service. [SM]
7/21/04	Order FILED GRANTING motion to file supplemental brief by Appellant Jacob Zedner, endorsed on motion dated 7/8/2004. Supplemental brief due on 8/16/04, Appellee response (if any) due on 9/13/04. Before Hon. PNL, RR, Circuit Judges, Hon. SHS, District Judge. (TY) [SM]
9/13/04	APPELLEE United States of America, supplemental response brief filed with proof of service. [SM]
12/22/04	APPELLANT Jacob Zedner, 28(J) letter FILED. [SM]
12/30/04	APPELLEE United States of America, 28(J) letter FILED. [SM]

FILING DATE	DESCRIPTION
1/4/05	Letter dated 1/4/05 from Edward S. Zas, USDJ re: correcting a misstatement in the 28(J) letter filed on 12/30/04 received [SM]
1/26/05	APPELLANT Jacob Zedner, 28(J) letter FILED. [SM]
1/27/05	Record on appeal after index filed. (3 vols.) [VM]
3/8/05	Judgment of the district court is AFFIRMED the judgment of conviction, but VACATED the sentence and REMAND for resentencing by published signed opinion filed. (PNL) [RO]
3/8/05	Notice to counsel in re: Opinion dated 3/8/05. [RO]
3/14/05	Appellant Jacob Zedner motion extended time to file petition for rehearing to April 5, 2005 filed with proof of service. [RO]
3/15/05	Errata sheet re: filed. [RO]
3/16/05	Notice to counsel in re: Errata sheet dated 3/15/05 sent to all parties. [RO]
3/16/05	Order FILED GRANTING motion extended time to file petition for rehearing by Appellant Jacob Zedner, endorsed on motion dated 3/14/2005. to and including April 5, 2005. (AH) Extended Petition for rehearing is 4/5/2005. [RO]
3/23/05	Errata sheet re: filed. [RO]
4/5/05	Appellant Jacob Zedner Petition for rehearing and petition for rehearing en banc filed with proof of service. [RO]
5/24/05	Notice to counsel in re: Copy of order dated 5/24/05 sent to all parties. [RO]

FILING DATE	DESCRIPTION
5/24/05	Order FILED DENYING motion Petition for rehearing by Appellant Jacob Zedner, endorsed on motion dated 4/5/2005, Order FILED DENYING motion petition for rehearing en banc by Appellant Jacob Zedner, endorsed on motion dated 4/5/2005. (TWY) [RO]
6/2/05	Judgment MANDATE ISSUED. CLOSED [SM]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES
OF AMERICA

- against -

JACOB ZEDNER,

Defendant.

INDICTMENT

Cr. No. 285
(18 U.S.C. §§ 472, 1344 and 3551 et seq.)

----------X

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Indictment:

1. Dime Savings Bank ("Dime Savings") was a financial institution with a branch in Great Neck, New York. The deposits of Dime Savings were insured by the Federal Deposit Insurance Corporation.

2. Marine Midland Bank ("Marine Midland") was a financial institution with a branch in Great Neck, New York. The deposits of Marine Midland were insured by the Federal Deposit Insurance Corporation.

3. Chase Manhattan Bank ("Chase") was a financial institution with a branch in Great Neck, New York. The deposits of Chase were insured by the Federal Deposit Insurance Corporation.

4. Dreyfus Service Corporation ("Dreyfus") was a financial institution with a branch in Great Neck, New York. Dreyfus was a broker and dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

5. Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") was a financial institution with a branch in Great Neck, New York. Merrill Lynch was a broker and dealer registered with the Securiteis and Exchange Commission under the Securities Exchange Act of 1934.

6. Smith Barney was a financial institution with a branch in Manhasset, New York. Smith Barney was a broker and dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

7. Prudential Securities ("Prudential") was a financial institution with a branch in Garden City, New York. Prudential was a broker and dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

THE FRAUDULENT SCHEME

8. The defendant JACOB ZEDNER would attempt to open accounts at financial institutions, place bearer bonds on margin and borrow against them.

9. The bearer bonds that the defendant JACOB ZEDNER attempted to place on margin at financial institutions purported to be issued by the United States, but the defendant JACOB ZEDNER then and there well knew and believed that they were counterfeit and had not been issued by the United States.

COUNTS ONE THROUGH SEVEN
(Financial Institution Fraud)

10. Paragraphs One through Nine of this Indictment are repeated and realleged as if fully set forth herein.

11. On or about the dates set forth below, within the Eastern District of New York, the defendant JACOB ZEDNER did knowingly and intentionally attempt to execute a scheme: ( ) [sic] to defraud a financial institution, and (2) to obtain moneys, funds and credits owned by and under the custody and control of a financial institution, by means of false and fraudulent pretenses, representations and promises:

COUNT	APPROXIMATE DATE	FINANCIAL INSTITUTION	BOND AMOUNT
1	3/4/96	Dime Savings	$10 million
2	3/7/96	Dreyfus	$10 million
3	3/8/96	Merrill Lynch	$10 million
4	3/8/96	Marine Midland	$10 million
5	3/11/96	Chase	$10 million
6	3/12/96	Smith Barney	$10 million
7	3/12/96	Prudential	$10 million

(18 U.S.C. §§ 1344 and 3551 *et seq.*)

COUNT EIGHT
(Possessing Counterfeit Bonds)

12. Paragraphs One through Nine of this Indictment are repeated and realleged as if fully set forth herein.

13. On or about and between March 4, 1996 and March 12, 1996, both dates being approximate and inclusive, within the Eastern District of New York, the defendant JACOB ZEDNER, with intent to defraud, did

knowingly and intentionally keep in his possession falsely made and counterfeit obligations of the United States.

(18 U.S.C. §§ 472 and 3551 *et seq.*)

A TRUE BILL

/s/ Bruce A. [Illegible]
FOREPERSON

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Loretta E. Lynch
ACTING UNITED STATES ATTORNEY
PURSUANT TO 28 C.F.R. 0.131

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,	CR 96-285
v.	United States Courthouse Central Islip, New York
JACOB ZEDNER,	November 8, 1996 9:30 o'clock a.m.
Defendant.	

----------x

TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	LORETTA E. LYNCH United States Attorney One Pierrepont Plaza Brooklyn, N.Y. 11201 By: LEONARD LATO, ESQ. Assistant U.S. Attorney
For the Defendant:	REYNOLDS CARONIA & GIANELLI 200 Motor Parkway Hauppauge, New York 11788 By: JAMES HAGNEY, ESQ.
Court Reporter:	Owen M. Wicker, RPR 1180 Federal Plaza Central Islip, N.Y. 11722 (631) 712-6102

Proceedings recorded by mechanical stenography; transcript produced by computer transcription.

[2] (Case called.)

MR. LATO: For the government, Leonard Lato.

MR. HAGNEY: James F. Hagney, 200 Motor Parkway, Hauppauge, New York.

Your Honor, we have a request for adjournment of this case with my client waiving speedy trial to January 27th, if that meets with the Court's approval. The government is not opposing that, Judge.

THE COURT: Wait a minute now.

I think if I'm going to give you that long an adjournment, I will have to take a waiver for all time.

MR. HAGNEY: I'm sorry, Judge. I couldn't hear you.

THE COURT: I think I will have to take a waiver for all time because I have some big cases and if I get bogged down with them you may be a long while before you get a trial.

MR. HAGNEY: I'm not in a position for that. I understand there are a number of things that are going to be happening and that it will take some time.

THE COURT: I say, I'm perfectly willing to give it to you but I have to take what I call a complete waiver where he can't come in like Brendan Sullivan tried to do in a case and say I only waive for so long as it is convenient for me to waive.

[3] MR. HAGNEY: Exactly, Judge.

We've waive [sic] for all time. That will not be a problem. That will not be an issue in this case.

THE COURT: If they ever did that again, I would move to disbar him and I wrote it up in the books and published it. I don't think he liked it very much. I told him where he had broken his word to the Court and he didn't like that, but it was true.

Mr. Zedner, you do not have to answer any questions. Anything you say may be used against you in this proceeding or some subsequent proceeding. You are entitled to have a lawyer of your own choice. If you can't afford a lawyer the Court will appoint a lawyer to you at no cost to you.

Do you understand your rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, every defendant in a criminal case according to Congress is entitled to a speedy trial. And that speedy trial according to them is to take place between 40 days after your initial arraignment and 70 days after your initial arraignment.

THE DEFENDANT: Yes.

THE COURT: And if the Court or the government, regardless how busy they are do not give you a speedy trial in that basic time, you are entitled to make your [4] motion to dismiss the indictment against you and technically the Court is obliged to dismiss the indictment, that is not to say the government couldn't reindict you, but that is the way the law reads. The laws says, the speedy

trial law, if you don't make a motion to dismiss an indictment for failure for speedy trial before the trial commences, you waive that right, you can't get it back.

That being the case I've taken the position, and nobody has yet challenged it who has read the Speedy Trial Act, that if you can waive by inaction, i.e., not raising the motion to dismiss, you can waive affirmatively, knowledgeably, intelligently your right to do so, your right to a speedy trial and your right to make a motion to dismiss for the speedy trial.

Are you with me?

(Counsel confer.)

THE DEFENDANT: Yes, your Honor.

THE COURT: But once you say, Judge, I'm not going to and I will not make a motion to dismiss the case against me for failure to give me a speedy trial, you cannot get it back.

You've waived it and it's gone.

Do you understand?

THE DEFENDANT: Yes, your Honor, I understand.

[5] THE COURT: So it's gone for all times.

I'm prepared to start your trial right away. You were indicted some time ago, you were arraigned some time ago and a considerable amount of time has gone by already. Your lawyer wants to put this case over until January.

THE DEFENDANT: Yes.

THE COURT: I have some fairly big cases pending in my docket, one of which is set to take eight months for trial. If you get locked in, if that starts before you start, you may have to wait until that is done.

THE DEFENDANT: May I ask a question?

I don't mind for the Court, of course I expect the matter for my situation – for my situation to be okay from Washington, D.C., whether I was involved in that case, but the restriction to go to Washington, D.C. –

MR. HAGNEY: Your Honor, we have no problem with the speedy trial issue but he's raising another issue right now on his bail requirement. There is a restriction for him traveling to certain locations, one of his issues is to travel to Washington, D.C. which is an issue separate and apart from the speedy trial issue.

THE COURT: I want to make sure he knows what he's waiving.

THE DEFENDANT: Yes, your Honor, I understand.

[6] THE COURT: Following along with the speedy trial waiver form.

The first paragraph says, and my question to you is, have you been advised and do you fully understand that you are entitled to a speedy trial under the sixth amendment of the United States Constitution, the Speedy Trial Act of 1974 and the rules of this Court, the circuit and the speedy plan adopted by this court?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you fully understand this Court is prepared to give you a speedy trial in compliance with the foregoing authorities and to commence this trial next Monday, if you are ready to go. That's November the 12?

THE DEFENDANT: I understand.

THE COURT: And you understand you and your lawyer have asked that you need not be given a speedy trial and have stated and represented to the Court you wish to waive your rights to the speedy trial under the sixth amendment, et seq., and rules of this circuit and under the speedy trial plan adopted by this Court. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you fully understand if you do so waive your rights to a speedy trial you do so waive any [7] and all rights to make a motion addressed to dismiss the indictment against you for failure of the Court or the government to give you a speedy trial and you waive all of your rights to make a speedy trial and to make a motion or motions for all time. You waive them.

THE DEFENDANT: Yes.

THE COURT: Have any threats or promises of any kind been made to induce to you waive your rights to a speedy trial and your rights to dismiss the indictment?

THE DEFENDANT: Not yet, your Honor. Thank you.

THE COURT: Have you been coerced by anyone into making such waiver?

THE DEFENDANT: No, sir.

THE COURT: Are you making such waivers voluntarily and of your own free will because you wish to do so and for no other reason?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed your waivers fully with your attorney?

THE DEFENDANT: Yes.

THE COURT: – Now, in front of the Court.

THE DEFENDANT: Yes, your Honor.

THE COURT: How old are you?

THE DEFENDANT: 42, your Honor.

THE COURT: And what kind of education do you [8] have?

THE DEFENDANT: Your Honor, most of the time Hebrew school – Hebrew high school, 12 years.

THE COURT: And –

THE DEFENDANT: And Hebrew – what do they call it?

THE COURT: College?

THE DEFENDANT: Theology. They calling it theology, whatever you call it.

THE COURT: How many years of that?

THE DEFENDANT: Two years. Again, the Hebrew sector.

THE COURT: Well, we have religious schools here.

THE DEFENDANT: Yes.

THE COURT: And here as well as elsewhere in the world.

Having been advised of your rights to a speedy trial and your rights to make a motion and to dismiss in the event you are not given a speedy trial, do you hereby waive all rights and waive them for all times?

THE DEFENDANT: Yes, your Honor.

THE COURT: You may sign the waiver in open court and I'll enter an order finding the waiver is voluntarily and knowledgeably made, and Ms. Giangarra will swear you [9] in and take your oath.

(Whereupon, the defendant was duly sworn.)

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, do you want to go over until January 6th for another status, Counsel.

MR. HAGNEY: Excuse me, Judge?

THE COURT: Do you want to go over to January 6th or the 3rd for another status?

MR. HAGNEY: We were requesting January 31st, your Honor.

THE COURT: January 31st is a Friday. All right. We'll see you then.

MR. HAGNEY: Thank you very much, Judge.

THE COURT: Thank you.

(Proceedings adjourned.)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
LONG ISLAND OFFICE

NOV 06 1996

TIME A.M.
TIME P.M.

WAIVER OF SPEEDY TRIAL RIGHTS [NON CUSTODY CASE] CR-96-285 (TCP)

I, JACOB ZEBNER, being duly sworn, depose and say that:

1. I have been advised and fully understand I am entitled to a speedy trial under the Sixth Amendment to the United States Constitution, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), the Rules of this Circuit, and the Speedy Trial Plan adopted by this Court.

2. I have been advised and fully understand that this Court is prepared to give me a speedy trial in compliance with the foregoing authorities and commence such trial on November 12, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time.

Defendant

Witnessed and approved:

Attorney for Defendant

Subscribed and sworn to before me this 8th day of November, 1996.

Deputy Clerk

79

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,	CR 96-285
	U.S. Courthouse
JACOB ZEDNER,	Uniondale, N.Y.
Defendant.	January 31, 1997 9:30 a.m.

----------x

TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ROSLYNN MAUSKOPF United States Attorney 100 Federal Plaza Central Islip, N.Y. 11722 By: LEONARD LATO, ESQ. Assistant U.S. Attorney
For the Defendant:	JAMES HAGNEY, ESQ.
Court Reporter:	Owen M. Wicker, R.P.R. 100 Federal Plaza Central Islip, NY 11722 (631) 712-6102

Proceedings recorded by mechanical stenography; transcript produced by computer transcription.

[2] (Case called.)

MR LATO: Leonard Lato.

MR HAGNEY: James Hagney.

MR LATO: For the government Leonard Lato. Good morning, your Honor.

MR HAGNEY: James F. Hagney for the defendant. Good morning, Judge.

THE COURT: Are there several defendants in this case?

MR LATO: No, your Honor, just one.

MR HAGNEY: One, your Honor.

THE COURT: How come Petrizzo's mail got stuck in here? Shall I put the blame where it properly belongs in the Clerk's Office.

What do we want to do here gentlemen?

MR LATO: I would like to try the case sometime in 1997. Your Honor, the defendant has waived for all time but I would like to try it before then.

THE COURT: Well, are we ready otherwise?

MR HAGNEY: Your Honor, we are actually not and what has happened thus far, your Honor, we've waived and we also last time entered into a written stipulation where we've waived not only the speedy trial time but our right to bring a speedy trial motion which my client would readily consent to.

[3] THE COURT: You don't have to do it twice because once you've waived you can't get it back.

MR HAGNEY: My client is charged with possession of certain U.S. bonds to that go back to 1935. We are still in the process, your Honor, of trying to tap on the proper channels to authenticate those bonds, your Honor,

and unfortunately these were bonds that involved the US government, it involves perhaps, your Honor, the need to contact and get in touch with the appropriate people to perhaps demonstrate the authenticity of these bonds. It has been a process that has taken a lot of time. We've been in contact with lot of people and I know Mr. Lato is interested in this case coming to an end at some point in time.

I would ask your Honor for one more adjournment to May 2nd, your Honor, at which time we would set a trial date at that point in time, and if that date were to be toward the end of this year, your Honor, I have no objection to that at all.

That would be my request.

THE COURT: The end of the year? Now, these 1935 bonds, are they US treasury bonds.

MR HAGNEY: Well, as far as we know, your Honor, yes. That seems to be one of the issues here.

THE COURT: Do you have them?

[4] MR LATO: We have what has been referred to as "the bonds," your Honor.

THE COURT: They are not bonds?

MR LATO: No, not unless the United States can be spelled incorrectly, then it would still be a bond. No, it's not a bond, according to the government.

THE COURT: You didn't issue them?

MR LATO: I did not.

THE COURT: The claim is that these are counterfeit bonds.

MR LATO: That's correct, your Honor.

THE COURT: And they spelled United States U-S-I-N-T.

MR LATO: Not that I got. United started with an O.

THE COURT: Well, then there is not much question but they are counterfeit. How can you suggest they might be authentic?

MR HAGNEY: Your Honor, I'm not certainly a expert on any bonds but I'm told in certain bonds that are issued oftentimes there are things done to those bonds for reasons that I certainly don't have the capacity to testify to, your Honor.

THE COURT: Have you had an expert witness on [5] the subject?

MR HAGNEY: The problem, your Honor, there are two issues.

You can certainly get an expert that says it was spelled on that date –

THE COURT: In 1935, they were Onited bonds?

MR HAGNEY: Your Honor, I can only tell you some of the information.

THE COURT: I was alive in 1935. I don't remember any such – any news articles or anything like that about that time.

MR HAGNEY: The problem here, your Honor, these bonds were issued or prepared or were involved with the Chinese bonds.

THE COURT: Oh, they were Chinese bonds?

MR HAGNEY: They were issued in connection with them apparently, your Honor, and again the only thing –

THE COURT: Made in China.

And your client didn't think there was anything wrong with it?

MR HAGNEY: That's perhaps one of the issues, your Honor, whether or not he knew or should have known they were counterfeit.

At this point in time what we are trying to establish is whether or not there is someone that perhaps [6] might attest to the authenticity of the bonds.

THE COURT: The authenticity. How will you do that? I find it very difficult to believe anybody in the Treasury Department will authenticate these bonds and I'm trying to grasp what might be out there.

MR HAGNEY: Your Honor, I don't know if that person will lie necessarily within the Treasury Department but the person may lie within the government and that's the effort being made at this time, Judge.

THE COURT: The only people I know that are charged with this apart from the people in the Treasury Department are the Secret Service people. You better get some ex-Secret Service agent.

MR HAGNEY: That may be a possibility, Judge, but I'm certainly not speaking on my own personal knowledge in my capacity. I also have a bond expert, but I would

just like to have the opportunity to digest what my client and others have relayed to me.

If it turns out that our efforts are not successful, so be it, but I would like to have that opportunity on the part of the defendant, your Honor. That's all.

THE COURT: Well, I don't think I can give you that much time. Apparently the banks took them in as security?

[7] MR LATO: No, they didn't, your Honor.

THE COURT: They didn't?

MR LATO: No.

MR HAGNEY: There are some issues there, your Honor, with respect to actually what the nature of the conversations were with the bank with respect to the bonds, but that is kind of a secondary issue, Judge.

THE COURT: Well, it may be a primary issue.

When was this indictment or information handed up?

MR LATO: April 4th.

THE COURT: (Perusing)

April 1st for trial. I may not reach you but I may reach you shortly thereafter. This is a year old. That's enough for a criminal case.

MR HAGNEY: Judge, may I ask for sometime beyond April 1st to give us some opportunity to pursue this? My client has waived the speedy trial time.

THE COURT: We can't carry a case with in this kind of posture forever.

MR HAGNEY: I understand.

The government wanted to set a trial date during this year; I'm not objecting to that. If we can try the case later on in 1997, to try it –

THE COURT: May 5th.

[8] Get to work on it.

MR HAGNEY: All right, Judge. That's for trial, your Honor.

THE COURT: That's the date I'm tentatively scheduling for trial, assuming I can free myself up.

MR HAGNEY: Shall I check with the [sic] on that date –

THE COURT: Yes.

MR HAGNEY: Thank you very much, your Honor.

(Proceedings adjourned.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
– v –	**96 Cr. 285 (TCP)**
JACOB ZEDNER,	
Defendant.	

POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF JACOB ZEDNER'S COMPETENCY TO STAND TRIAL

LEONARD F. JOY
The Legal Aid Society
Federal Defender Division
135 Pinelawn Road, Suite 245N
Melville, New York 11747
Tel.: (516) 293-2500

Attorney for Defendant
Jacob Zedner.

Tracey Eadie Gaffey,
Edward S. Zas,
Of Counsel.

Johanna S. Zapp,
Law Student Intern

TO: LORETTA E. LYNCH
United States Attorney
Eastern District of New York
815 East Gate Boulevard
Garden City, New York 11530
Attn.: **LEONARD LATO**
Assistant United States Attorney

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

Preliminary Statement 1

Facts 2

A. The Charges 2

B. The Competency Hearing 3

Argument .....

THE EVIDENCE SHOWS THAT MR. ZEDNER IS COMPETENT TO STAND TRIAL 5

A. The Standard for Competency and the Burden of Proof 5

B. The Government Has Failed to Show that Mr. Zedner Is Not Competent 7

Conclusion 12

TABLE OF AUTHORITIES

CASES

Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000) 8

Drope v. Missouri, 420 U.S. 162 (1975) 7, 8

Dusky v. United States, 362 U.S. 402 (1960) 5

Medina v. California, 505 U.S. 437 (1992) 7

Moody v. Johnson, 139 F.3d 477 (5th Cir. 1998) 10

Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997) 10

Noland v. French, 134 F.3d 208 (4th Cir. 1998) 10

United States v. Duran-Duran, 1990 WL 49357 (N.D.N.Y. 1990) 6

United States v. Gold, 790 F.2d 235 (2d Cir. 1986) 6

United States v. Morrison, 153 F.3d 34 (2d Cir. 1998) 9, 10

United States v. Nichols, 56 F.3d 403 (2d Cir. 1995) 5, 9

United States v. Vamos, 797 F.2d 1146 (2d Cir. 1986) 7, 8, 9

STATUTES

18 U.S.C. § 472 2

18 U.S.C. § 1344 2

18 U.S.C. § 4241(d) 5, 6

18 U.S.C. § 4241(f) 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
– v –	**96 Cr. 285 (TCP)**
JACOB ZEDNER,	
Defendant.	

POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF JACOB ZEDNER'S COMPETENCY TO STAND TRIAL

Preliminary Statement

Defendant Jacob Zedner respectfully submits this memorandum of law in support of his competency to stand trial. The evidence presented at the competency hearing

on July 10, 2000 – including medical testimony, the representations of defense counsel, and Mr. Zedner's demeanor in court – demonstrates by a clear preponderance of the evidence that he understands the proceedings against him and is able to consult with his counsel with a reasonable degree of rational understanding.

Moreover, Mr. Zedner no longer insists on proving at trial the authenticity of the documents at issue in this prosecution. Rather, he is willing to allow counsel, on his behalf, to defend against the charges on the ground that, at the time of the alleged conduct, Mr. Zedner honestly *believed* that the documents were genuine, and thus lacked the intent to defraud anyone.

In these circumstances, this Court should find that Mr. Zedner is competent and should schedule this matter for trial as soon as possible. The alternative – finding Mr. Zedner incompetent and remanding him to the custody of the Attorney General for treatment – is not supported by the law or the facts, will further delay this prosecution, and will not promote the interests of justice.

Facts

A. The Charges.

As the Court is aware, Mr. Zedner was indicted in this case more than four years ago. He is charged with seven counts of attempting to defraud financial institutions, in violation of 18 U.S.C. § 1344, and one count of possessing counterfeit obligations of the United States, in violation of 18 U.S.C. § 472. The government contends that, over a one-week period in March of 1996, Mr. Zedner tried to open accounts at a number of financial institutions by

using bearer bonds purported to be issued by the United States. The bonds, on their face, contained a number of obvious spelling errors and other indicia that they could not possibly be real. The banks immediately recognized that the bonds were phony; none of them lost any money.

The government now seems to agree with the medical evidence showing that Mr. Zedner suffers from mental illness and delusions that cause him to believe that the bonds in this case are genuine. The government has alleged, however – and must prove beyond a reasonable doubt at trial – that Zedner in 1996 "well knew and believed that [the bonds] were counterfeit and had not been issued by the United States." *See* Indictment, ¶ 9. We do not believe that the government will be able to prove this allegation at trial.

B. The Competency Hearing.

The sole witness at the competency hearing was Dr. Sanford L. Drob, a noted expert in the field of forensic psychology. Dr. Drob's credentials are impressive. He is the director of psychological assessment at Bellevue Hospital, where he has been employed since 1981. Tr. 4.[1] He also is the senior psychologist on the Bellevue Prison Ward, and has conducted competency hearings for the City of New York since 1984. Tr. 4. He also holds two doctorates, one in clinical psychology and one in the philosophy of psychology. Tr. 4.

Dr. Drob conducted a thorough examination of Mr. Zedner. He concluded that, while Zedner suffers from a

[1] References to "Tr." are to the transcript of the competency hearing conducted on July 10, 2000.

delusional disorder, he meets the test for competency. In Dr. Drob's opinion, Mr. Zedner is functioning "fairly well," he "understands the charges against him," and he is able to assist counsel in his defense. Tr. 20-21. Dr. Drob's main concern was that Zedner might insist upon trying to prove at trial that the bonds in this case are genuine. If he did not insist upon this defense, Dr. Drob testified, "then he meets the rest of the criteria for competency." Tr. 24. In Dr. Drob's words:

> If in fact he is able to put his circumscribed delusion in the corner and proceed with a defense such as lack of intent or insanity, then I guess he could go [to trial]. I mean, then I would find him competent. There are lots of people who are insane who go to trial with an insanity defense who still retain some of their delusional thoughts. We find them competent. He has all the other elements of competency.

Tr. 26. This conclusion of competency accords with the conclusion reached previously by another expert, Dr. Naomi Goldstein, who examined Mr. Zedner in 1997 and also found him competent. The government did not call any expert (or any other witness) to testify that Mr. Zedner is not competent.

Dr. Drob's testimony was supported by the views of defense counsel. As counsel advised the Court at the hearing, we believe that Mr. Zedner is competent and that he "is willing to have the Federal Defenders as counsel for all purposes, and to assist in his defense." Tr. 2. This remains true as of this writing.

Finally, as the Court saw at the July 10 hearing, Mr. Zedner's demeanor has changed noticeably since the first competency hearing in 1998. Although Dr. Drob's testimony

about him was less than flattering, Mr. Zedner listened calmly as Dr. Drob testified, he did not interrupt the proceedings, he did not insist on testifying, and he consulted with counsel during the competency hearing. In short, he was fully alert and cooperative.

Argument

THE EVIDENCE SHOWS THAT MR. ZEDNER IS COMPETENT TO STAND TRIAL.

A. The Standard for Competency and the Burden of Proof.

In *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), the Supreme Court set forth the test for competency: the defendant must have "sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as a factual understanding of the proceedings against him." *Id.* at 402 (emphasis added). The defendant may not be committed to the custody of the Attorney General for treatment unless "the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to understand the nature and consequences of the proceedings against him or to assist properly in his defense. . . . " 18 U.S.C. § 4241(d). The mere possibility that a defendant might become incompetent in the future is not sufficient.

Neither the Supreme Court nor the Second Circuit has squarely decided which party bears the burden of proof at a competency hearing. *See United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995) (declining to resolve the issue). However, the overwhelming weight of authority

holds that the burden of proof falls on the government. *See id.* at 410 (citing cases). In this case, it is especially appropriate to place the burden of proof on the government, because a defendant is presumed to be competent, and the government is in the unusual position of arguing against this presumption. *See United States v. Duran-Duran*, 1990 WL 49357, *1 (N.D.N.Y. 1990) (noting that one can infer from the text of 18 U.S.C. § 4241(d) "that a presumption of competency exists" and that the burden of proof falls "on the party asserting that the defendant is presently incompetent to stand trial"). As discussed below, the government has not met its burden.

Finally, before turning to the evidence, it is important to note that the question of Mr. Zedner's mental competency is entirely distinct from whether he has a valid defense to the charges against him. As the Second Circuit has declared, "the insanity defense and the matter of competence to stand trial are independent of one another because they involve [the defendant's] mental states at different times and because the ultimate questions are different." *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986). An insanity defense would focus on Mr. Zedner's mental state at the time of his alleged conduct in 1996 and on such questions as whether he was "unable to appreciate the nature and quality or the wrongfulness of his conduct." *Id.* "By contrast, the matter of [the defendant's] competence to stand trial focuses on his current mental state and on such questions as his comprehension of the charges and of the nature of the proceedings against him, and his ability to assist properly in the preparation of his defense." *Id.* For these reasons, Congress has provided that "[a] finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in

raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged." 18 U.S.C. § 4241(f).

B. The Government Has Failed to Show that Mr. Zedner Is Not Competent.

The government has not shown by a preponderance of the evidence that Mr. Zedner is incompetent. Indeed, it has not called a single witness to testify that Mr. Zedner is not competent at the present time. On the contrary, the evidence shows that he understands the proceedings, is able and willing to assist in his defense, and that his delusions will not interfere with counsel's ability to present a viable "lack of intent" defense.

In deciding competency, the Court should consider "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Moreover, the Court may place considerable weight on the opinion of defense counsel, who "will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992) (citations omitted). *See also United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986) ("failure by trial counsel to indicate the presence of such difficulties [as an inability to assist in the defense or to comprehend the proceedings] provides substantial evidence of the defendant's competence.").

When these factors are considered, Mr. Zedner's competency becomes apparent. To be sure, his beliefs about the validity of the bonds in this case and the secret workings of the Federal Reserve Board are "irrational," *Drope*, 505 U.S. at 450, but these beliefs will not interfere

with Mr. Zedner's defense. On the contrary, those beliefs *are* the defense. And, "[i]t is well-established that some degree of mental illness cannot be equated with incompetence to stand trial." *Vamos*, 797 F.2d at 1150-51 (citing *Hall v. United States*, 410 F.2d 653, 658 (4th Cir. 1969)). *See also Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) ("neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial") (citation omitted).

Mr. Zedner's demeanor also supports a finding that he is competent. As the Court saw at the hearing, he is alert and cooperative. He no longer insists upon serving subpoenas on high-level government officials or proving that the bonds in the case are valid.

Furthermore, as discussed above, Dr. Drob's testimony supports a finding of competency. He testified without hesitation that Mr. Zedner understands the charges and the proceedings and that he is able to consult with counsel. Drob's only concern was whether Zedner would insist upon presenting an irrational defense. That concern, a valid one, has not materialized. There is no reason to believe that Mr. Zedner's current willingness to cooperate with and assist counsel will not continue, especially if trial takes place soon.

Under all of these circumstances, the case law warrants a finding of competency. In *United States v. Vamos*, 797 F.2d 1146 (2d Cir. 1986), for example, the Second Circuit affirmed the district court's finding of competency even though defense counsel had told the court that the defendant was "'totally beyond reason' and unable to assist in the preparation of her defense," and a psychiatrist had

"testified to having serious doubts about [the defendant's] competency to stand trial." *Id.* at 1149. The defendant, like Mr. Zedner, made claims having a "delusional flavor," *id.*, but she was nevertheless able to stand trial. The same is true of Mr. Zedner.

Similarly, in *United States v. Nichols*, 56 F.3d 403, 411-13 (2d Cir. 1995), the Second Circuit affirmed a finding of competency despite five psychiatric reports that suggested the defendant suffered from paranoid delusions. Furthermore, in *United States v. Morrison*, 153 F.3d 34 (2d Cir. 1998), the district court found the defendant competent even though a psychologist could not rule out the possibility of delusional ideas, and, in fact, had found evidence that the defendant suffered from "grandiose and paranoid delusions." *Id.* at 39. The Court of Appeals affirmed.

Mr. Zedner is at least as competent as the defendants who were found competent in *Nichols, Vamos, Morrison*, and in many other cases. *See, e.g., Noland v. French*, 134 F.3d 208, 211, 219 (4th Cir. 1998) (defendant competent despite prior psychiatrist's opinion that defendant was mentally ill and dangerous and testimony of defendant and counsel that defendant was incompetent); *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998) (defendant competent despite experts' testimony that brain damage left defendant unable to consult with counsel); *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997) (defendant competent despite aberrant behavior and expert testimony that defendant may have mental disorder where defendant had no history of mental illness, and displayed no irrational behavior at trial).

Finally, while Mr. Zedner's competency is supported by the facts and the law, there are also important practical considerations that militate in favor of a finding that he is competent. After years of representing him in this case, the Federal Defenders have earned Mr. Zedner's trust and confidence. If the Court finds him competent, this trust will be enhanced and the trial of this four-year old case can proceed expeditiously. Indeed, Mr. Zedner is prepared to waive a jury trial and proceed to trial before the Court immediately.[2]

On the other hand, if Mr. Zedner is found incompetent and remanded, as the government urges, the consequences are unpredictable. First, he is likely to lose confidence in his current counsel and may return to his former uncooperative state. Moreover, a finding of incompetency is immediately appealable, and thus will further delay this matter.[3] Even if such a finding is affirmed, there will be a delay of several months while Mr. Zedner is treated by prison officials, and there is no guarantee that Zedner will return from prison very different than he is now. *See* Tr., 19 (estimating that the chances are "much less than 50 percent" that Zedner "will come back much different"). And, even if prison officials conclude in several months that Mr. Zedner is competent, he might insist at that point on trying this case before a jury *pro se*, which he would have a constitutional right to do. This would not be in anyone's interest.

---

[2] The government, however, has informed counsel that it will not consent to a bench trial.

[3] On the other hand, a finding that Mr. Zedner is competent would not be final and appealable unless and until he is convicted and sentenced.

In sum, the law, the evidence, and the interests of justice and judicial efficiency warrant a finding that Mr. Zedner is competent to stand trial.

Conclusion

For these reasons, this Court should find that Mr. Zedner is competent and should schedule this case for trial.

Dated: New York, New York
August 4, 2000

Respectfully submitted,

LEONARD F. JOY
The Legal Aid Society
Federal Defender Division

By: /s/
TRACEY EADIE GAFFEY
Attorney for Defendant
Jacob Zedner
135 Pinelawn Road, Suite 245N
Melville, New York 11747
Tel.: (516) 293-2500

Edward S. Zas,
Of Counsel.

Johanna S. Zapp,
Law Student Intern

U.S. Department of Justice

[LOGO]

United States Attorney
Eastern District of New York

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United States Attorney's Office
300 Rabro Drive
Hauppauge, New York 11788

August 11, 2000

The Honorable Thomas C. Platt
United States District Judge
Eastern District of New York
2 Uniondale Avenue
Uniondale, NY 11553

Re: United States v. Jacob Zedner
Docket No. CR 96-285 (TCP)

Dear Judge Platt:

The Government submits this post-hearing letter in support of its position that the defendant Jacob Zedner is presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial.

Charges

In early March 1996, Zedner approached financial institutions with the aim of opening an account with "Treasury bonds" having a face value of $10 million. The bonds, containing misspellings such as "Onited Staes of America," were bogus.

Zedner gave the agents who arrested him different explanations for the misspellings. One explanation was

that the misspellings represented a "secret code" used to establish the bond's legitimacy. To complement his incredible explanations, Zedner stated that he had received the bonds from Taiwan's "Eagle Chang" and that the bonds were given to Chiang Kai-shek when he fled to Taiwan during the communist takeover of China.

Pre-Competency Proceedings

After his arrest on March 13, 1996, Zedner appeared before Magistrate Judge Lindsay, who appointed James Hagney to represent Zedner. Zedner was indicted on April 4, 1996, and appeared for arraignment before the Court on April 16, 1996.

At a status conference held on May 2, 1997, which was the Friday before jury selection, the Court, *sua sponte*, ordered the appointment of Dr. Naomi Goldstein, a board-certified psychiatrist, to examine Zedner. The Court adjourned the trial pending receipt of Dr. Goldstein's report. (A 8).

Competency Proceedings

By letter dated August 5, 1997, Dr. Goldstein informed the Court that Zedner was mentally competent to stand trial.

At a status conference held on September 8, 1997, the district court granted Zedner's motion to have Mr. Hagney relieved, to proceed *pro se* and to have Tracey Gaffey of the Legal Aid Society represent him in an advisory capacity.

On the date scheduled for jury selection, the Court asked standby counsel and the prosecutor to conference a

matter in chambers. The Court stated that Zedner's proposed defense – that the bonds were genuine – led it to question Zedner's competence. At that point, the Government moved, under 18 U.S.C. § 4241, to have Zedner committed to the custody of the Attorney General for a competency examination.

The Court discharged the prospective jurors and held a competency hearing. Zedner represented himself, with Ms. Gaffey as standby counsel.

By memorandum and order dated October 19, 1998, the Court held:

> Defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that defendant is unable to understand the nature and consequences of the proceedings against him and to assist properly in his defense. Thus, a thorough and extensive psychiatric examination of defendant is essential. For that reason, the Court is ordering that he be committed to the custody of the Attorney General for hospitalization and treatment in a suitable facility pursuant to 18 U.S.C. § 4241(d).

Zedner appealed. The Court of Appeals held that this Court should not have permitted Zedner to represent himself at the hearing and reversed the Court's order and remanded the matter for a new hearing.

The Hearing Following Remand

A new hearing was held on July 10, 2000. Zedner's attorney, Tracey Gaffey, called one witness, Sanford L. Drob, the director of psychological assessment at Bellevue

Hospital and the senior psychologist at the Bellevue prison ward. (T 4). The Government did not call any witnesses.

i. Direct Examination

Dr. Drob testified that he administered two tests: the MCMI III test and the Rorschach test. (T 9). According to Dr. Drob, while the MCMI III "did not indicate the presence of a mental illness" or "the presence of a severe psychiatric disturbance," "the results of the Rorschach were suggestive of a serious psychological disorder." (T 10). "I believe Mr. Zedner suffered at the time I examined him from a delusional disorder," Dr. Drob testified. (T 11).

Dr. Drab explained the basis of his belief:

> . . . Mr. Zedner told me, for example, that he was the head of a group of people who were managing all of the money in the Federal Reserve in the United States. That he was a member of the Masonic Order and that he was entrusted with hundreds of billions of dollars to manage, although he claimed he wasn't making a dime off of any of this. . . .
>
> Some of Mr. Zedner's other interests, his interests in numerology and mysticism[,] are typical of individuals who might have delusional disorders. . . . Given the psychological test results, it leads me to believe with a high degree of clinical certainty that at the time I saw him, that his statements about his virtually unlimited power over the United States Federal Reserve system[] are the product of a delusional disorder.

(T 12-13).

Dr. Drob went on to testify that a delusion "is a radically false fixed belief" and that there were two types of delusions: "bizarre delusions and non-bizarre delusions." (T 14). Dr. Drob compared the two types:

> As an example of a bizarre delusion, I had a patient a year ago [] who believed that he was impregnated by an alien and that he was carrying the baby of an alien, but that baby was also a clock and that he could hear it ticking. It is bizarre. It just doesn't make sense.
>
> An example of a non-bizarre delusion would be that a person believes that his spouse is having affairs with all of the men in his office. She's not having those affairs, it is clear to everyone that she isn't, but he believes that that is happening. It is non-bizarre because it could happen in reality.
>
> Now there are many delusions that are hard to categorize as to being either bizarre or non-bizarre. If one believes that one is controlling all of the wealth of the United States, it is sort of on the border. It is kind of bizarre.

(T 14-15). Nevertheless, Dr. Drob stated that it was his opinion that Zedner was competent to stand trial. Dr. Drob testified:

> I believe that Mr. Zedner [] understands the functioning of everybody here in the courtroom. I believe that he understands the charges against him. And I believe that he's able to sit down and have a rational conversation with his attorney, with one possible exception. Which is how to proceed with his defense.
>
> . . .

> . . . I don't see an alternative defense other that he was either, you know, not mentally competent at the time when he did this, or that because of his mental problems, he didn't – never believed that they were – I don't know.

(T 20-22).

ii. Cross-Examination

To demonstrate that Zedner's delusions were bizarre and that Zedner was incompetent, the Government elicited the following:

> Q. . . . [W]hen [Mr. Zedner] told you that he was part of some organization that runs the Federal Reserve Board, you didn't feel it necessary to contact Alan Greenspan, correct?
>
> A. No, I did not.
>
> Q. In fact, you did not have to do any independent investigation to determine whether Mr. Zedner controlled 50 billion dollars, correct?
>
> A. I did not.

(T 30-31).

> Q. How many people have you heard or read about [] who have fancied themselves the head of the Federal Reserve [S]ystem, chosen by some unnamed group?
>
> A. This is the first time. I believe this is a delusion, there is no doubt in my mind that it's a delusion.

> Q. . . . [I]f [Mr. Zedner] persists in this belief that the bonds are legitimate, that is bad judgment [ ] or is it delusional?
>
> A. It is bad judgment conditioned – caused by his delusion.
>
> Q. Well, . . . is it bad judgment to jump out of a plane without a parachute at 20 thousand feet . . . if you think you can fly, or is [sic] delusional?
>
> A. All other tings [sic] being equal, I would say that that's delusional.
>
> Q. Is there any possibility whatsoever that the bonds that Mr. Zedner is talking about are legitimate?
>
> A. In my mind? No.

(T 36-37).

Although on direct-examination Dr. Drob stated that he was not "terribly optimistic" that Zedner could be treated for his delusions, (T 18), when asked on cross-examination that not "terribly optimistic" left open the possibility that he could be treated, Dr. Drob responded, "Yes, definitely. He could be helped, sure." (T 38).

Dr. Drob conceded that Zedner had "waffled a bit on th[e] issue" of whether the bonds were genuine and that there was no way of knowing whether, during the trial, Zedner would revert to his delusion that the bonds were genuine and thereby hurt his defense:

> Q. If Mr. Zedner persists in telling his attorney during the trial . . . these bonds are legitimate and conduct your cross-examinations and direct examinations [to show] that the

bonds are legitimate, is he helping in his defense?

A. At that point, he would be allowing his delusions to get the best of him and be at cross purposes to his defense, in my opinion, as a result of mental illness.

(T 43-44).

Legal Standard

Although "the Government may file a motion for a hearing to determine the mental competency of the defendant," 18 U.S.C. §4241(a), "there [is] no settled view of where the burden of proof should lie," *Medina v. California,* 505 U.S. 437, 447 (1982); *see also United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995) (recognizing that "[t]he federal statute providing for competency hearings does not allocate the burden of proof"). Nevertheless, " 'The allocation of the burden of proof to the defendant [or to the Government] will affect competency determinations only in a narrow class of cases where the evidence . . . that a defendant is competent is just as strong as the evidence that he is incompetent.' " *Nichols,* 56 F.3d at 410 (quoting *Medina,* 505 U.S. at 449).

"In making a finding of competency, the district court may rely on a number of factors, including medical opinion and the court's observation of the defendant's comportment." *Nichols,* 56 F.3d at 411. "The mental illness must deprive the defendant of the ability to consult with his lawyer 'with a reasonable degree of rational understanding' and to understand the proceedings against him rationally as well as factually." *Id.* at 412 (quoting *Dusky v. United States,* 362 U.S. 402, 402 (per curiam) (1960)).

The "district court's finding [will be upheld on appeal] unless clearly erroneous," and "'[w]here there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.'" *Nichols*, 56 F.3d at 411 (quoting *United States v. Villegas*, 899 F.2d 1324, 1341 (2d Cir. 1990)). Thus, if the Court determines that Zedner:

> is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant . . . for such a reasonable time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed.

18 U.S.C. § 4241(d).

Argument

According to Zedner, "The government has not shown . . . that Mr. Zedner is incompetent. . . . On the contrary, the evidence shows that he understands the proceedings, is able to assist in his defense, and that his delusions will not interfere with counsel's ability to present a viable 'lack of intent" defense.'" (Br. at 7). "[H]is beliefs about the validity of the bonds . . . and the secret workings of the Federal Reserve Board are 'irrational,' . . . but these beliefs will not interfere with Mr. Zedner's defense. On the contrary, those beliefs *are* the defense. (Br. at 8) (emphasis in original).

Although Zedner fails to come out and say it, his "lack of intent defense" is an insanity defense. What Zedner intends to do at trial is show that at the time he attempted to negotiate the bonds, he insanely believed that the bonds were genuine and that the misspellings on the bonds were part of "the secret workings of the Federal Reserve Board." Given the bonds [sic] facial irregularities, which rendered them as obviously bogus as money used in the board game Monopoly, a standard "lack of intent" defense is unavailable. Zedner is loathe to concede this now, however, which explains why he has not filed a Notice of Insanity Defense as required by Rule 12.2, because such a concession would lend some support to the proposition that he still is insane.

To show that he is now competent, Zedner contends that "[h]e no longer insists upon serving subpoenas on high-level government officials or proving that the bonds in the case are valid." (Br. at 8). Zedner's assurances are not comforting. As Dr. Drob testified, Zedner has "waffled a bit on th[e] issue," and nothing will prevent Zedner from waffling during the trial. Indeed, he is just as delusional now as when he contended that the bonds were legitimate. As Dr. Drob testified, Zedner now fancies himself "the head of a group of people who were managing all of the money in the Federal Reserve in the United States" and that he has been "entrusted with hundreds of billions of dollars to manage." The delusions have changed, but they are still delusions and just as bizarre.

Conclusion

Zedner is still suffering from a mental defect rendering him mentally incompetent to assist properly in his defense. The Court should commit him to the custody of

the Attorney General for treatment in a suitable facility not to exceed four months.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: /s/ Leonard Lato
Leonard Lato
Assistant U.S. Attorney
Tel: (631) 234-1250
Fax: (631) 234-8725

cc: Tracey L. Eadie Gaffey, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-v-	NOTICE OF MOTION
JACOB ZEDNER,	96 Cr. 285 (TCP)
Defendant.	

PLEASE TAKE NOTICE, that upon the annexed declaration of Edward S. Zas, the accompanying memorandum of law, and all prior proceedings in this matter, defendant Jacob Zedner hereby moves for an order dismissing the indictment with prejudice pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, and the Speedy Trial Clause of the Sixth Amendment.

Dated: New York, New York
March 5, 2001

Yours, etc.,

LEONARD F. JOY, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER DIVISION

By: /s/ Edward S. Zas
EDWARD S. ZAS
Attorney for Defendant
Jacob Zedner
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	DECLARATION
JACOB ZEDNER,	:	96 Cr. 285 (TCP)
Defendant.	:	

EDWARD S. ZAS declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney with The Legal Aid Society, Federal Defender Division, counsel to defendant Jacob Zedner. I make this declaration in support of Mr. Zedner's motion to dismiss the indictment with prejudice under the Speedy Trial Act and the Speedy Trial Clause of the Sixth Amendment.

2. Mr. Zedner was indicted in this case nearly five years ago, on April 4, 1996. He was charged with seven counts of attempting to defraud financial institutions, in violation of 18 U.S.C. § 1344, and one count of possessing counterfeit obligations of the United States, in violation of 18 U.S.C. § 472. The government contends that, over a one-week period in March of 1996, Mr. Zedner tried to

open accounts at a number of financial institutions by using bearer bonds purported to be issued by the United States. The bonds, on their face, contained a number of obvious spelling errors and other indicia that they could not possibly be real. The banks immediately recognized that the bonds were phony; none of them lost any money.

3. Mr. Zedner was released on bail following his arrest. His bail conditions required him to post a bond in the amount of $500,000, secured by the deeds to two homes. He also has not been permitted to travel outside of the Eastern and Southern Districts of New York, and has been subject to reporting requirements.

4. On October 19, 1998, Mr. Zedner was found incompetent to stand trial. His interlocutory appeal from the order declaring him incompetent was decided on October 1, 1999. The matter was remanded on October 22, 1999, and a new competency hearing was held on July 10, 2000. Mr. Zedner filed his post-hearing memorandum on August 4, 2000. The government filed its post-hearing memorandum on August 11, 2000. The competency motion has been under advisement since that date. Thus, as of this writing, the competency issue has been pending for more than six months.

WHEREFORE, it is respectfully requested that the Court order that the indictment be dismissed with prejudice.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 5, 2001

/s/ Edward S. Zas
EDWARD S. ZAS

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	**96 Cr. 285 (TCP)**
JACOB ZEDNER,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JACOB ZEDNER'S MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE UNDER THE SPEEDY TRIAL ACT AND THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT

Preliminary Statement

Defendant Jacob Zedner respectfully submits this memorandum of law in support of his motion to dismiss the indictment under the Speedy Trial Act of 1974, as amended (the "Act"), 18 U.S.C. § 3161 *et seq.* (2000). The motion should be granted because more than 70 days have elapsed since Mr. Zedner was indicted and he still has not been brought to trial. Moreover, the factors enumerated in the Act and in the case law support dismissal of the indictment with prejudice.

Facts[1]

Mr. Zedner was indicted in this case nearly five years ago, on April 4, 1996. He was charged with seven counts of attempting to defraud financial institutions, in violation of 18 U.S.C. § 1344, and one count of possessing counterfeit obligations of the United States, in violation of 18 U.S.C. § 472. The government contends that, over a one-week period in March of 1996, Mr. Zedner tried to open accounts at a number of financial institutions by using bearer bonds purported to be issued by the United States. The bonds, on their face, contained a number of obvious spelling errors and other indicia that they could not possibly be real. The banks immediately recognized that the bonds were phony; none of them lost any money.

Mr. Zedner was released on bail following his arrest. His bail conditions required him to post a bond in the amount of $500,000, secured by the deeds to two homes. He also has not been permitted to travel outside of the Eastern and Southern Districts of New York, and has been subject to reporting requirements.

On October 19, 1998, Mr. Zedner was found incompetent to stand trial. His interlocutory appeal from the order declaring him incompetent was decided on October 1, 1999. On October 22, 1999, the mandate issued and the matter was remanded. A new competency hearing was held on July 10, 2000. Mr. Zedner filed his post-hearing memorandum on August 4, 2000. The government filed its post-hearing memorandum on August 11, 2000. The competency motion has been under advisement since that

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[1] These facts are taken from the accompanying declaration of Edward S. Zas.

date. Thus, as of this writing, the competency issue has been pending for more than six months.

Argument

I.

THE SPEEDY TRIAL ACT REQUIRES THAT THE INDICTMENT BE DISMISSED WITH PREJUDICE.

A. The Speedy Trial Act Requires Dismissal of the Indictment.

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (2000), requires the government to bring a defendant to trial within 70 days of the date he was indicted or his first appearance before a judicial officer, whichever is later. 18 U.S.C. § 3161(c)(1). If this period is exceeded, the Court must dismiss the indictment upon motion of the defendant. 18 U.S.C. § 3162(a)(2). The Court also must decide, after considering the enumerated statutory factors, whether dismissal should be with or without prejudice. 18 U.S.C. § 3162(a)(2).

Mr. Zedner was indicted nearly five years ago, following various preliminary court appearances. He has still not been brought to trial. Accordingly, the indictment must be dismissed.

While the Act excludes certain periods of delay from the speedy trial computation, the mandatory 70-day period has still been exceeded. The Act excludes periods of "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant." 18 U.S.C. § 3161(h)(1). Thus, the Act excludes the period between October 22, 1999, the date the Court of Appeals remanded this case for a new

competency hearing, and August 11, 2000, the date the final post-hearing memorandum was filed. The Act also excludes the period while the competency motion has been "under advisement," but only for 30 days. *See* 18 U.S.C. § 3161(h)(1)(J) (excluding "delay reasonably attributable to any period, *not to exceed thirty days*, during which any proceeding concerning the defendant is actually under advisement by the court") (emphasis added).

Here, the competency motion has been "under advisement" since August 11, 2000, the date the government submitted its post-hearing memorandum. *See, e.g., Henderson v. United States*, 476 U.S. 321, 328-29 (1986) (Act "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' *i.e.*, 30 days from the time the court receives all papers it reasonably expects. . . ."); *United States v. Johnson*, 29 F.3d 940, 942-42 (5th Cir. 1994) (matter is considered "under advisement" once court receives all submissions from counsel); *United States v. DiTommaso*, 817 F.2d 201, 209 (2d Cir. 1987) (speedy trial clock began to run 30 days after final post-hearing brief was due); *United States v. Clark*, 807 F.2d 412, 413 & n.2 (5th Cir. 1986) (competency motion was "under advisement" when court "received all of the documents needed to determine competency"). Accordingly, even omitting the periods excluded by the Act, the indictment must be dismissed, because more than 70 days – more than five months – have elapsed since September 11, 2000, which was 30 days after the competency motion was taken under advisement. The government did not seek or

obtain an order excluding any of the time following September 11, 2000, from the speedy trial computation.[2]

B. The Court Should Dismiss the Indictment With Prejudice.

The remaining issue is whether the indictment should be dismissed with prejudice. The Act states that, "in determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). In this case, these factors warrant dismissal with prejudice.

1. Seriousness of the Offense.

The first statutory factor, the seriousness of the offense, weighs in favor of dismissal with prejudice. While no federal crime is trivial, Mr. Zedner's alleged offenses, the product of mental illness, are non-violent, caused no harm, and are therefore not as serious as many other federal crimes. *See United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983) (for speedy trial purposes, offense of opening mail without authority was not "a 'serious' crime, absent exacerbating circumstances such as violence;" indictment dismissed with prejudice). *Cf. United States v. Koory*, 20 F.3d 844, 847 (8th Cir. 1994) (possession of

[2] Time periods may not be excluded retroactively for speedy trial purposes. *United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995); *United States v. Tunnessen*, 763 F.2d 74, 77-79 (2d Cir. 1985).

cocaine with intent to distribute within 1,000 feet of an elementary school and related weapons charge were "serious" offenses, warranting dismissal without prejudice); *United States v. Wells*, 893 F.2d 535, 538 (2d Cir. 1990) (charged offense of impersonating federal officer, carrying gun, and claiming official authority to do so was "serious offense").

2. The Circumstances Leading to Dismissal.

The second statutory factor, the "facts and circumstances" leading to dismissal of the indictment, also favors dismissal with prejudice. This inquiry focuses on the cause of the speedy trial violation. Here, Mr. Zedner bears no responsibility for the violation; on the contrary, in his post-hearing memorandum in support of his competency (at pp. 2, 10-11), filed in August of 2000, he requested a trial "as soon as possible." *See United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990) (affirming dismissal with prejudice where defendant "had at all times indicated his own readiness for trial and had opposed the government's requests for delays"); *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992) (dismissal with prejudice proper when delay was not caused by defendant, but resulted from administrative oversight, even though charge "serious").

The government, moreover, has taken no action since the competency hearing in July of 2000, to ensure compliance with the Speedy Trial Act. *See Giambrone*, 920 F.2d at 182 (affirming dismissal with prejudice where "government made no effort to have [two-month period of] time excluded on any basis permissible under the Act" and failed to "convey to the court the fact that there was need

for an expedited trial"); *Caparella*, 716 F.2d at 981 (dismissal with prejudice affirmed despite absence of "evil motive" on the part of government; "[m]eeting established time limitations is important and lack of attention nor dilatoriness in observing them should not be encouraged by courts viewing such neglect tolerantly."); *United States v. Rivas*, 782 F. Supp. 686, 687 (D. Me. 1992) (dismissing case with prejudice where, *inter alia*, prosecutor "failed to ask the Court to bring the case forward to trial on an expeditious basis in conformity with the requirements of the Act."), *aff'd*, 973 F.2d 36 (1st Cir. 1992).[3] By arguing against Zedner's competency, and thereby opposing his request in August for a prompt trial, and by failing to remind the Court of the speedy trial requirements, the government bears some responsibility for the violation in this case. *See Giambrone*, 920 F.2d at 180-82; *United States v. Russo*, 741 F.2d 1264, 1267-68 (11th Cir. 1984) (dismissal with prejudice warranted where ignorance or negligence led to government's failure to prosecute).

3. Administrative Concerns.

The administration of the Act and of justice also support dismissal with prejudice. Mr. Zedner's alleged offenses were not the product of criminal intent, but of mental illness. Additionally, he has lived under the stress and cloud of a federal indictment for almost five years. *See Upton*, 921 F. Supp. at 103 (noting the "prolonged 'anxiety

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[3] "[T]he defendant is not obligated to bring himself to trial. The duty rests upon the state to bring prosecutions to a speedy conclusion." *United States v. Upton*, 921 F. Supp. 100, 103 (E.D.N.Y. 1995) (citing *Barker v. Wingo*, 407 U.S. 514, 528 (1972)), *aff'd*, 78 F.3d 65 (2d Cir. 1996)[.]

and concern' defendants are reasonably expected to endure by virtue of a pending criminal indictment and by the possible impairment of a defendant's ability to mount a defense which a prolonged delay may cause.") (citing *Barker v. Wingo*, 407 U.S. 514 (1972); footnote omitted). And, as a result of his bail conditions, his liberty has been impinged and his life disrupted for this substantial period of time. *See United States v. Giambrone*, 920 F.2d 176, 180-81 (2d Cir. 1990) (affirming dismissal with prejudice; "whether [the defendant] is free on bail or not, . . . [the delay] may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends") (citations omitted). Under these circumstances, the effect of allowing the government to re-indict Mr. Zedner would be severe. "'Reprosecution in this case would send exactly the wrong signal to those responsible for complying with the Act's requirements and would, in all likelihood, foster in [the] future a cavalier regard, if not a concerted disregard of those requirements.'" *Rivas*, 973 F.2d at 39 (quoting district court opinion). As the Second Circuit has noted, "we view a violation of *any* of the Act's time limitations as negatively impacting on the administration of the Act." *Caparella*, 716 F.2d at 981 (emphasis added).

4. Other Factors.

In addition to the three factors explicitly mentioned in the Act, other factors – the length of the delay in this case and the ensuing prejudice to Mr. Zedner – counsel in favor of dismissal with prejudice.

There is "little doubt" that Congress intended prejudice to the defendant to be a relevant factor for the Court to consider in making its determination of whether to dismiss with prejudice. *United States v. Taylor*, 487 U.S. 326, 334 (1988). *Accord*, *United States v. Upton*, 921 F. Supp. 100, 104 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 65 (2d Cir. 1996). Here, the half-decade that has elapsed since the indictment was filed will inevitably hamper Mr. Zedner's ability to defend himself at trial. The central issue at a trial would concern his mental state at the time of his conduct in March of 1996. It will be difficult, given the passage of five years, changed circumstances, potential lapses in memory, and the possible disappearance of witnesses, to establish what his mental condition was like that long ago. *Cf. Pate v. Robinson*, 383 U.S. 375, 387 (1966) (noting the "difficulty of retrospectively determining an accused's competence to stand trial" six years earlier); *Dusky v. United States*, 362 U.S. 402, 403 (1960) (citing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago").

Courts have dismissed indictments with prejudice in circumstances where the speedy trial violation was less egregious than it is here. *See, e.g.*, *Giambrone*, 920 F.2d at 181 (affirming dismissal with prejudice where Act's 70-day period was exceeded by only 20 days and defendant had been left "in the disadvantageous position of an indicted but untried defendant for more than a year"). As Judge Glasser has noted in dismissing an indictment with prejudice, "The prolonged delays in this case are the targets at which the Speedy Trial Act was clearly aimed and weighs heavily in the balance as does the adverse effect those prolonged delays must inevitably have upon

the presentation of a meaningful defense." *Upton*, 921 F. Supp. at 105.

In short, to allow the government to re-indict in these circumstances would "undermine the integrity of the Act and the principles it was intended to protect." *United States v. Angelini*, 553 F. Supp. 367, 371 (D. Mass. 1982) (dismissing indictment with prejudice where Act was violated).

II.

THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT REQUIRES THAT THE INDICTMENT BE DISMISSED WITH PREJUDICE

Dismissal with prejudice is also required by the Speedy Trial Clause of the Sixth Amendment. By dismissing the indictment with prejudice pursuant to the speedy trial statute, however, *see supra* Point I, the Court need not reach the constitutional aspects of the speedy trial violation here.

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court announced a four-part test for evaluating constitutional speedy trial claims. This test balances (1) the length of the delay; (2) the reason for the delay; (3) whether and how the defendant asserted the speedy trial right; and, (4) the prejudice to the defendant. *Id.* at 530-33.

Under the first prong of the *Barker* test, the delay is measured from the date the defendant was indicted or arrested, whichever is earlier. *See Redd v. Sowders*, 809 F.2d 1266, 1269 (6th Cir. 1987). Here, that period is five years. This extensive delay creates a strong presumption of prejudice to Mr. Zedner that must be weighed against

the other *Barker* criteria. Indeed, most courts hold that even a one-year delay is presumptively prejudicial. *See, e.g., United States v. Henson*, 945 F.2d 430, 437 (1st Cir. 1991) (9½-month delay); *Wells v. Peacock*, 941 F.2d 253, 257-58 (3d Cir. 1991[])] (217-day delay); *United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998) (35-month delay is "uncommonly long and thus presumptively prejudicial"); *United States v. Jernigan*, 20 F.3d 621, 622 (5th Cir. 1994) (three-year delay); *United States v. Walker*, 92 F.3d 714, 717 (8th Cir. 1996) (37-month delay; delay approaching one year presumptively prejudicial).

The second *Barker* factor, the cause of delay, has been discussed above. As with the speedy trial statute, the Speedy Trial Clause of the Constitution does not require the defendant to show bad faith or intentional delay on the part of the government. Rather, delays caused by simple negligence or crowded calendars may also be considered. *See Barker*, 407 U.S. at 531.

The third *Barker* criterion focuses on whether and how the defendant asserted his speedy trial right. A vigorous and timely assertion of the right enhances a Sixth Amendment speedy trial claim. *Id.* at 530-32. Mr. Zedner's request for a prompt trial in August of 2000 qualifies as such an assertion. *See Redd v. Sowders*, 809 F.2d 1266, 1271 (6th Cir. 1987) (defendant's single demand for a speedy trial and reduction in bail was sufficient assertion of speedy trial right); *United States v. Padilla*, 819 F.2d 952, 963 (10th Cir. 1987) (letter to federal magistrate judge seeking to have federal charges addressed constituted demand for speedy trial).

Finally, the remaining *Barker* factor considers prejudice to the defendant, such as (1) oppressive pre-trial

restrictions on liberty; (2) anxiety and concern; and (3) impairment of the defense. 407 U.S. at 530-33. The third type of prejudice is the most important because the inability to prepare a defense "skews the fairness" of the judicial process. *Id.* at 532. For the reasons discussed in Point I, *supra*, all of these factors weigh in Mr. Zedner's favor.

Accordingly, the Sixth Amendment requires that the indictment be dismissed with prejudice. *See Upton*, 921 F. Supp. at 103-05.

* * *

In sum, given the law, the facts, and the interests of justice, the Court should bring this stale prosecution to an end by dismissing the indictment with prejudice.

Conclusion

For these reasons, this Court should order that the indictment be dismissed with prejudice.

Dated: New York, New York
March 5, 2001

Respectfully submitted,

LEONARD F. JOY
The Legal Aid Society
Federal Defender Division

By: /s/ Edward S. Zas
EDWARD S. ZAS
Attorney for Defendant
Jacob Zedner
52 Duane Street
New York, New York 10007
Tel.: (212) 417-8742

TRACEY L. EADIE GAFFEY,
Of Counsel.

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES
OF AMERICA,

Plaintiff,

-against-

JACOB ZEDNER,

Defendant.

----------x

MEMORANDUM
AND ORDER

96 Cr. 285 (TCP)

PLATT, District Judge.

Defendant's attorney, Tracey Gaffey of the Federal Defender's Office, has made a Motion to Dismiss the indictment against the defendant for failure of the Court and the Government to give the defendant a speedy trial pursuant to 18 U.S.C. § 3161, completely ignoring or otherwise overlooking the fact that early on in this complex (both medical and multiple witness) litigation, defendant with the advice and assistance of counsel, under oath, waived all of his rights in open court and in a signed writing to a speedy trial for all time (copy of waiver annexed hereto).

Defense counsel will almost certainly argue that speedy trial rights may not, under the Act, be waived, but again she completely ignores or otherwise overlooks the fact that under the Act a defendant may waive his rights to speedy trial by inaction (i.e. by not raising the right prior to the commencement of a trial) 18 U.S.C. § 3162(a)(2), and, hence, most certainly may waive such

rights by affirmative action as he has done voluntarily and under oath, with the advice of counsel, here.

Moreover, defendant, of course, made no such motion on the morning of the date on which the case was called to commence the trial on the merits and may be said to have waive by inaction at that point. 18 U.S.C. § 3162(a)(2). Prior to that date, the defendant, himself, had issued and served some 33 subpoenas on witnesses to appear for the trial on that date. Among the more illustrious of these witnesses were:

U.S. President William Jefferson Clinton
U.S. Attorney General Janet Reno
U.S. Secretary of State Madeline Albright
U.S. Senator Alphonse D'Amato
Chiang Kai-shek
U.S. Treasury Secretary Robert Rubin
U.S. Federal Reserve Chairman Alan Greenspan
National Security Advisory to the White House
Andy Burger [sic: Sandy Berger]

In light of the facts then known to it, instead of selecting a jury from a panel waiting in the courthouse for that purpose, the Court, with the consent and in the presence of present counsel, conducted a competency hearing.

Among other things, the Court was aware of the fact that (i) defendant had been arrested on March 12, 1996, (ii) an indictment had been returned and filed on April 4, 1996, charging defendant with seven counts in a scheme to defraud financial institutions and one count of knowingly possessing counterfeit bonds, (iii) defendant was maintaining that he had no knowledge of the counterfeit nature of the financial instruments in question from the date of his receipt thereof in March 1996 to October 1998 and (iv) that even when advised by a representative of the U.S.

Treasury Department that they were counterfeit he accepted such advice "with reservations."

At the competency hearing, defendant identified two of the counterfeit bonds that were tendered to those institutions named in the first seven counts of the indictment. Each of these bonds were in the face amount of *ten million* dollars. Defendant testified that he received those bonds approximately a week before his arrest via courier from two individuals named "Eagle Chang" and "Tommy Chin" who were located in Taiwan and with whom he had spoken on the telephone, but had never met. According to the defendant, the bonds arrived in connection with an anticipated transfer by these individuals of *three trillion* dollars and a power of attorney to defendant pursuant to arrangements, that were never fully explained.

In earlier statements to Government agents, defendant said that the bonds, which showed a date of issue of 1935, were given to Chiang Kai-shek when he fled to Taiwan during the Communist takeover of mainland China (which occurred in 1949). The bonds purportedly issued by "Ministry of Finance of the USA" contained a number of obvious deficiencies on their face such as "Onited Staes," identical serial numbers and a stated duration of "forevev." One of defendant's several explanations for the misspellings was that they represented a "secret code" used to establish the bond's legitimacy.

Attached to a number of the subpoenas and exhibits given to the Court at the hearing and on prior occasions were copies of the counterfeit notes, bonds and other instruments that defendant repeatedly claimed were authentic, but which bore such inscriptions as (i) "United States of America – THREE HUNDRED MILLION DOLLARS – [drawn on] Huau Bank 1933"; (ii) "The Ministry of

Finance of USA entrusts the Washington Bank of America with responsibility for the issue of US Dollra (sic) Bond to all over the world (sic) since 1935"; and a Federal Reserve Note describing itself as (iii) "Hua Qi Bank Certificate Note [on which] [y]ou can draw one hundred million U.S. dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . [signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949."

It is incomprehensible to this Court how defendant rationally might maintain lack of knowledge as to the counterfeit nature of these instruments for over two years following his arrest by government agents, his indictment by a grand jury, the inscriptions on the instruments, and repeated statements to the contrary by government agents and other institutions.

Attached hereto and made a part hereof is a copy of the Court's written Memorandum and Order dated October 19th summarizing what happened at the competency hearing.

Defendant appealed and the Second Circuit reversed, accepting a misleading misrepresentation by another member of the Federal Defender's Office, stating that the Court had held a competency hearing and erred by allowing defendant to proceed pro se at the competency hearing without ever having determined defendant's competency to make a knowing and intelligent waiver of the right to representation by counsel. The fact is, however, that defendant was represented by counsel who immediately, prior to the hearing, advised the Court that defendant proposed to conduct the entire trial by himself (opening,

cross examination, direct and summation) without the assistance of counsel. At that point, the Court insisted that the defendant must have counsel (if only in an advisory capacity) throughout the proceedings and the trial. The Court of Appeals said Ms. Tracey Gaffey did not ask or object to a single question. That is true, but she did not do so because she was obviously told by her client not to do so.

Ms. Tracy Gaffey is a highly competent counsel. The defendant had repeatedly said in prior proceedings he did not want Ms. Gaffey or any other lawyer to represent him; indeed, he did not want her to be in court with him. Only by reason of this Court's insistence was she permitted to remain and to represent him as she did.

Among defendants [sic] parting words to the Court after the hearing were an admonition to the Court that defendant wanted all of the subpoena recipients, including the "illustrious ones" named above, to appear for his trial.

Nonetheless, following the Second Circuit's Opinion on October 1, 1999, the Court held a second competency hearing on July 10, 2000, at which Ms. Gaffey called Sanford L. Drob, (not a psychiatrist but) the director of psychological assessment at Bellevue Hospital and the senior psychologist at the Bellevue prison ward. Dr. Drob testified that while his tests did not indicate the presence of a mental illness or the presence of a severe psychiatric disturbance, they were "suggestive of a serious psychological disorder," that he believed that he suffered from a "delusional disorder," and that there were two types of delusions, bizarre delusions and non-bizarre delusions.

On cross examination Dr. Drob conceded that it was not necessary for him to communicate with Alan Greenspan to

determine whether or not Mr. Zedner was (as he claimed to be) part of an organization that ran the Federal Reserve Board; that it was not necessary for him to conduct an independent investigation to determine whether Mr. Zedner (as he claimed) controlled fifty million dollars in bonds; that he (Dr. Drob) had never theretofore heard or read about a person who fancied himself as the head of the Federal Reserve System; that in his mind there was no possibility whatsoever that the bonds that Mr. Zedner was talking about were legitimate and that he (Dr. Drob) was not "terribly optimistic" that Mr. Zedner could be treated for his delusions but there was a possibility that he could be helped.

The law apparently still is that a "District Court's finding will be upheld unless clearly erroneous" and "where there are two permissible views of the evidence as to competency, the Court's choice between them cannot [sic] be deemed fairly erroneous." *United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995).

This Court, of course, is neither a psychiatrist nor a psychologist, but good old fashioned "common sense" tells this Court that it is not normal[:]

1. To receive via courier from two individuals named Earl Chang and Tommy Chin located in Taiwan with whom one had spoken but had never met, bonds with a face amount of Ten million dollars to be followed by Three trillion dollars worth of bonds and a power of attorney.

2. That legitimate bonds would show that a date of issue of 1935 which were issued by

the "Ministry of Finance of USA" and contained obvious deficiencies on their face such as "Onited Staes," identical serial numbers with a stated duration of "forevev."

3. That the obvious misspellings were a "secret code" "used to establish the bonds' legitimacy."

4. A normal person carried an identification card which said "United Nations, New York affiliate 06 December 1997, Number 1010233."

5. This "was an international security matter."

6. The individual was doing the United States a favor as "his job was to bring the money to the United States for investment."

7. That he used the name of John Davidson because it was "related to his sensitive work and when you're dealing with the Russians and Chinese its very sensitive work."

8. That the notes, bonds and other instruments claimed to be authentic bore inscriptions as (a) United States of America – THREE HUNDRED MILLION DOLLARS – [drawn on] Huau Qi Bank 1933, (b) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility fo [sic] the issue of US Dollra (sic) Bond to all over the world (sic) since 1935," and (c) a federal reserve note describing itself as "Hua Qi Bank Certificate Note [on which] [y]ou can draw one million U.S. dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit [sic] 6th October 1949 (sic) . . . 9signed] Dhtladelphla [sic] Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted [sic] States

> of America Clevesand [sic], Ohio. Auouit (sic) 10, 1949.
>
> 9. He needed the testimony of President Clinton, Attorney General Reno, Secretary of State Allbright, Senator D'Amato, Chiang Kai-shek, Treasury Secretary Rubin, Federal Reserve Chairman Greenspan and National Security Advisor Burger [sic] to explain to a court and jury the secret code and authenticity of the bonds, notes and other instruments.

Good old fashion common sense also tells the undersigned (if no one else) that such thinking is not only delusional, but patently and blatantly bizarre and that one who holds such beliefs must be suffering from a mental disease or defect which renders him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Under 18 U.S.C. § 4241(e), the law requires this Court to commit the defendant for such a reasonable time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed.

Accordingly, defendant's motion to dismiss must be and hereby is denied and defendant must appear on March 30, 2001 at 9:30 a.m. for sentencing in accordance with this Memorandum and Order.

SO ORDERED.

/s/ Thomas C. Platt
District Judge, United
States District Court

Dated: Central Islip, New York
March 21, 2001

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
LONG ISLAND OFFICE

★ NOV 06 1996 ★

TIME P.M.
TIME A.M. 11/8/96

WAIVER OF SPEEDY TRIAL RIGHTS [NON CUSTODY CASE] CR-96-985 (TCP) Attachment I

I, JACOB ZEDNER, being duly sworn, depose and say that:

1. I have been advised and fully understand I am entitled to a speedy trial under the Sixth Amendment to the United States Constitution, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), the Rules of this Circuit, and the Speedy Trial Plan adopted by this Court.

2. I have been advised and fully understand that this Court is prepared to give me a speedy trial in compliance with the foregoing authorities and commence such trial on November 12, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time.

Defendant

Witnessed and approved:

Attorney for Defendant

Subscribed and sworn to before me this 8th day of November, 1996.

Deputy Clerk

137

ATTACHMENT II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES
OF AMERICA,

– against –

JACOB ZEDNER,

Defendant.

----------x

MEMORANDUM
AND ORDER

96-CR-285 (TCP)

PLATT, District Judge:

The government moved pursuant to 18 U.S.C. § 4241(a) for a hearing to determine the mental competency of defendant. On October 14, 1998, this Court held a hearing pursuant to sections 4241(a) and 4247(d) thereon. Under a grant of testimonial immunity, and at his own request, defendant testified at such hearing.

In prior proceedings, defendant stated that he wished to proceed *pro se*. At a conference with defendant's assigned attorney and government counsel immediately prior to the competency hearing, this Court inquired whether defendant wished to conduct any part of the trial himself. Assigned counsel advised that defendant proposed to conduct the entire trial, including opening, closing and direct and cross-examination of all witnesses, without the assistance of counsel.

In preparation for a trial on the merits scheduled to commence on October 14th, defendant himself issued some thirty-three subpoenas to witnesses, many of whom seemed to have little or no information regarding the

issues in this case. The more illustrious of these witnesses included:

U.S. President William Jefferson Clinton
U.S. Attorney General Janet Reno
U.S. Secretary of State Madeline Albright
U.S. Senator Alphonse D'Amato
Mrs. Chaing [sic] Kai-Shek
U.S. Treasury Secretary Robert Rubin
U.S. Federal Reserve Chairman Alan Greenspan
National Security Advisor to the White House
Sandy Burger [sic: Berger]

Furthermore, among defendant's parting words after the hearing was an admonition to the Court that defendant wanted all of the subpoena recipients to appear for his trial. (TR 88).

Defendant was arrested on March 12, 1996. In an indictment returned and filed on April 4, 1996, defendant was charged with seven counts in a scheme to defraud financial institutions and one count of knowingly possessing counterfeit bonds. Defendant maintained that he had no knowledge of the counterfeit nature of the financial instruments in question from the date of his receipt thereof in March 1996, to October 8, 1998, when pursuant to a pre-trial order of this Court, a representative of the U.S. Treasury Department (Domestic Division) so advised him. However, defendant indicated that while he accepted this advice, he did so "with reservations."

At the competency hearing, defendant identified two of the counterfeit bonds that were tendered to those institutions named in the first seven counts of the indictment. Each of these bonds was in the face amount of ten-million ($10,000,000.00) dollars. Defendant testified that he received these bonds approximately a week before his

arrest via courier from two individuals named "Eagle Chang" and "Tommy Chin," who were located in Taiwan and with whom he had spoken on the telephone but had never met. According to defendant, the bonds arrived in connection with an anticipated transfer by these individuals of three-trillion ($3,000,000,000.00) dollars and a power of attorney to defendant pursuant to an arrangement that was never fully explained.

In earlier statements to government agents, defendant said that the bonds, which showed a date of issue of 1935, were given to Chaing [sic] Kai-Shek when he fled to Taiwan during the communist takeover of mainland China [which occurred in 1949]. The bonds, purportedly issued by "the Ministry of Finance of USA," contained a number of obvious deficiencies on their face, such as "onited staes," identical serial numbers and a stated duration of "forevev." One of defendant's several explanations for the misspellings was that they represented a "secret code" used to establish the bonds' legitimacy.

As indicated above, from the date of his arrest to October 8, 1998, defendant repeatedly and consistently claimed that the bonds were authentic and valid negotiable instruments. At his competency hearing on October 14, 1998, defendant claimed that he became aware of and accepted the bonds' lack of authenticity "with reservations" through his discussion with the U.S. Treasury representative on October 8, 1998, arranged pursuant to a subpoena. Defendant explained that his "reservations" were based on the fact that the Treasury Department representative was not a "Treasury Department *International*" representative (emphasis added).

On August 8, 1996, defendant arranged for an "expert" from New Jersey who "authenticated" various copies of the bonds, notwithstanding the fact that the originals at that point were in the possession of government agents.

The Court ordered a competency exam of defendant in mid-1997 and received a report from Dr. Naomi Goldstein dated August 5, 1997, based on an hour-and-a-half interview conducted on July 15, 1997. While much of the above information was not available to Dr. Goldstein, nonetheless she reported among other things that:

> (a) when we started to talk, he volunteered that he could not go public at a trial with this case because it contained so many sensitive issues;
>
> (b) he produced an identification card with a photograph. The card said "United Nations, New York affiliate, 06 December 1997, #1010233";
>
> (c) he explained in a number of different ways how he came to be in possession of the bond and stated that he was given a power of attorney by a court in China to negotiate the bond;
>
> (d) he states that he was charged with a fraudulent document and that he was allegedly going to "get money" for himself;
>
> . . . .
>
> (e) he explained that his first attorney had resigned when he tried to subpoena a series of people from the International Monetary Fund;
>
> (f) he states that people were sent to "calm him down" in court;

(g) he claimed that this "was an international security matter and a very delicate matter";

. . . .

(h) he feels he did the United States a favor, "did great things for America," as "his job was to bring the money to the United States for investment"; and

(i) he states that his use of the name John Davidson "was related to his sensitive work, and 'when your [sic] dealing with the Russians and Chinese . . . it's very sensitive work.'"

While concluding that defendant was competent to understand the charges and proceedings and was able to cooperate in his own defense, Dr. Goldstein said that "without additional history, it would be impossible to make a psychiatric diagnosis . . . [but that at that time] there is no evidence of a major mental illness." Nonetheless she asserted that the "prognosis is difficult to assess."

At defendant's competency hearing on October 14, 1998, the Court was informed that Dr. Goldstein has since retired.

At the outset of defendant's hearing, defendant presented to the Court with [sic] a written opinion of Robert Daley, a psychologist, dated May 14, 1997, who concluded on the basis of a conversation with defendant, and apparently without any of the foregoing background information, that defendant was competent.

Attached to a number of the subpoenas and exhibits given to the Court at the hearing and on prior occasions were copies of the counterfeit notes, bonds and other instruments that defendant repeatedly claimed were

authentic, but which bore such inscriptions as (i) "United States of America – THREE HUNDRED MILLION DOLLARS – [drawn on] Huau Bank 1933"; (ii) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility for the issue of US Dollra (sic) Bond to all over the world (sic) since 1935"; and a Federal Reserve Note describing itself as (iii) "Hua Qi Bank Certificate Note [on which] [y]ou can draw one hundred million U.S. dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . [signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949." It is incomprehensible to this Court how defendant rationally might maintain lack of knowledge as to the counterfeit nature of these instruments for over two years following his arrest by government agents, his indictment by a grand jury, the inscriptions on the instruments, and repeated statements to the contrary by government agents and other institutions.

Dr. Goldstein's admonition in 1977 [sic: 1997] that "without additional history" (some of which is now available as indicated above) "a psychiatric diagnosis is impossible" and that the prognosis is "difficult to assess," together with all of the foregoing and the Court's several personal observations of defendant over the past several years have led it to conclude that defendant presently is suffering from a mental disease or defect rendering him mentally incompetent to the extent that defendant is unable to understand the nature and consequences of the proceedings against him and to assist properly in his defense. Thus, a thorough and extensive psychiatric examination of defendant is essential. For that reason, the Court is ordering that he be committed to the custody of

the Attorney General for hospitalization and treatment in a suitable facility pursuant to 18 U.S.C. § 4241(d).

SO ORDERED.

/s/ Thomas C. Platt
Thomas C. Platt, U.S.D.C.

Dated: Uniondale, New York
October 19, 1998

U.S. Department of Justice

[SEAL] *United States Attorney*
Eastern District of New York

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United States Attorney's Office
610 Federal Plaza
Central Islip, New York 11722-4454

March 22, 2001

The Honorable Thomas C. Platt
United States District Judge
Eastern District of New York
1044 Federal Plaza
Central Islip, NY 11722

Re: United States v. Jacob Zedner
CR 96-285 (TCP)

Dear Judge Platt:

The Government submits this letter in opposition to Jacob Zedner's motion to dismiss the indictment with prejudice.

FACTS

On April 16, 1996, following Zedner's earlier arrest and release on bond, the Court arraigned Zedner on an indictment charging him with possessing counterfeit U.S. Treasury bonds and attempting to use the bonds to defraud financial institutions. The Court subsequently conducted two status conferences: one on June 7, 1996, at which Zedner's then-attorney, James Hagney, failed to appear, and one on June 21, 1996, at which Zedner failed to appear. The Court entered an order of excludable delay

until the status conference of June 26, 1996. (DSE 5 & 9, 11-14).[1]

At the June 26th conference, Zedner stated that he needed to review documents in Washington, D.C. The parties then agreed, and the Court so declared, that the case was complex, and the Court entered an order of excludable delay through September 6, 1996. At the September 6th conference, however, the case was again adjourned, this time with an order of excludable delay until November 8, 1996. (DSE 15-16, 19-20).

At the November 8th conference, Zedner executed a "waiver of speedy trial for all time," and the Court entered a corresponding order of excludable delay. (DSE 21-23).

At the conference held on January 31, 1997, the Government stated that it was ready for trial. Zedner stated that he was not ready, so the Court postponed jury selection and trial until May 5, 1997. (DSE 25-26).

On the eve of trial – Friday, May 2, 1997 – the Court held a status conference and, at Zedner's request, relieved Mr. Hagney and appointed Tracy Gaffey in an advisory capacity. Concerned about Zedner's mental competence to stand trial – Zedner contended that the Treasury bonds were genuine, notwithstanding that they contained misspelled words – the Court ordered the Government to make arrangements to have Dr. Naomi Goldstein, a psychiatrist, to [sic] examine Zedner. (DSE 26).

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[1] Parenthetical references to "DSE" are to entries on the docket sheet, a copy of which is attached.

The Court conducted a status conference on May 16, 1997. At the conference, the Court appointed Ms. Gaffey to represent Zedner in a full capacity, and the Court adjourned the trial date pending a report from Dr. Goldstein. (DSE 28).

On August 7, 1997, the Court received Dr. Goldstein's report. In Dr. Goldstein's opinion, Zedner was competent to stand trial. (DSE 29).

At a status conference held on September 8, 1997, Zedner complained about his "Legal Aid attorney" (presumably Ms. Gaffey). The Court granted his request to proceed pro se with a Legal Aid attorney assisting in an advisory capacity to help him prepare subpoenas for, among other persons, then-President Clinton and then-Attorney General Reno. The Court issued the subpoenas Zedner had requested, but nearly all of the recipients of the subpoenas moved to quash them. The Court referred the motion to a magistrate judge. (DSE 30, 35 & 46).

On October 20, 1997, in what was perhaps his most bizarre act to date, Zedner moved to dismiss the indictment on the grounds that the Government had violated his civil rights and that the Government agents who had investigated him were guilty of treason and conspiracy. (DSE 47-49).

The Court conducted status conferences on December 16, 1997, and December 17, 1997. At the December 17th conference, the Court scheduled jury selection and trial for February 17, 1998. But at the status conference of January 30, 1998, the Court, at Zedner's request, adjourned the trial date to permit him to serve additional subpoenas on, among other fictitious entities, "The Treasury Department of Treasury International Corporation." Shortly thereafter,

Zedner filed a letter requesting a hearing on what he contended was a national security matter: the failure of the Board of Governors of the Federal Reserve System to admit that it possessed papers concerning some sort of trust in which Zedner maintained an interest. (DSE 68-70, 75-76).

Zedner continued to file bizarre motions and request subpoenas for entities that either did not exist or did not possess information relevant to his outrageous claim that the Treasury bonds, each of which had a face value of $10 million, were genuine. Nearly all of the status conferences revolved around these requests. (*See* DSE 78, 80, 83, 86-93, 95-98).

On October 8, 1998, the Court conducted a hearing concerning the subpoenas Zedner had served on a representative from the Treasury Department and on employees of various financial institutions. Following the hearing, the Court scheduled jury selection and trial for October 14, 1998. (DSE 100).

On October 14, 1998, with a jury panel called and waiting, the Court conferred with counsel over the Court's continued concern over Zedner's competency. The Court dismissed the panel and ordered the Attorney General to take custody of Zedner for the purpose of determining whether he was mentally competent to stand trial. The Court stayed its order, however, to allow Zedner to appeal. (DSE 101, 107-08).

Zedner filed a notice of appeal and, by order dated October 26, 1999, the Court of Appeals vacated the Court's order and remanded the case for a new competency hearing. The Court of Appeals held that this Court should not

have permitted Zedner to proceed pro se at the competency hearing. (DSE 109, 116).

Although the Court attempted to conduct a status conference on April 4, 2000, only the Government appeared on that date. The conference was rescheduled for April 27, 2000. On that date, Ms. Gaffey and Edward Zas, the author of Zedner's brief to the Court of Appeals, were present. The Court set the matter down for a new competency hearing on July 10, 2000. (DSE 119-20).

The competency hearing was held on July 10th. Following the hearing, the Court invited the parties to submit briefs by August 11, 2000. The briefs were timely filed. Even though Ms. Gaffey represented Zedner at the hearing and filed a post-hearing brief in his behalf, Zedner filed a post-deadline, pro se brief on August 23, 2000. (DSE 121 & 124-125).

On March 7, 2001, Zedner, through Mr. Zas, filed a motion to dismiss the indictment, with prejudice, on the ground that Zedner's speedy trial rights had been violated. (DSE 126-27). Although the job of preparing the motion normally would have fallen to Ms. Gaffey, Mr. Zas prepared the brief because, as set forth in the accompanying affirmation of Leonard Lato, Ms. Gaffey had been unavailable since in or about late November 2000.

ARGUMENT

According to Zedner, "the indictment must be dismissed" on speedy trial grounds because he "was indicted nearly five years ago" and "has still not been brought to trial." (Br. at 3).

1. Alleged Speedy Trial Violation

Zedner's motion is not only frivolous, but it borders on bad faith. Mr. Zas, the motion's author, reviewed or should have reviewed the docket sheet in this case. He therefore knows or should know that at every court appearance from arraignment until the status conference of November 8, 1996, the Court entered an order of excludable delay. He knows or should know that on November 8th, Zedner executed a waiver of speedy trial for all time, making further orders of excludable delay unnecessary. He knows or should know that on January 31, 1996, the Government stated that it was ready for trial, while Zedner stated that he was not ready. Mr. Zas knows or should know that on the eve of the first scheduled trial date of May 5, 1997, Zedner asked the Court to relieve his then-attorney, James Hagney. Mr. Zas knows or should know all of these things, yet in his brief he mentions none of them.

Zedner's waiver does not prohibit the Court, on its own motion, from finding a speedy trial violation. In the Government's view, however, it does eliminate Zedner's right to make such a motion. If Mr. Zas has a different view, he should say so and give his rationale rather than pretend that a potentially dispositive issue does not exist.

2. Dismissal With or Without Prejudice

According to Mr. Zas, the indictment should be dismissed with prejudice because the factors the Court must consider in deciding the issue all "warrant dismissal with prejudice." (Br. at 5).

In calling for a dismissal with prejudice, Mr. Zas demonstrates that his apparent bad faith is not limited to the procedural history of this case, but extends to a distortion of

the facts, an attempt to distance himself from his earlier positions and a reliance on appellate cases that do not support his arguments.

It is well-settled that "[i]f a criminal defendant is not brought to trial within 70 non-excluded days from the filing of an indictment, the mandatory remedy provided by the [Speedy Trial] Act is dismissal of the indictment on motion of the defendant." *United States v. Gambino*, 59 F.3d 353, 362 (2d Cir. 1995).

If dismissal is required, "the court may, within its discretion, dismiss the case without prejudice." *Id.* In deciding whether dismissal is to be with or without prejudice, the court must consider three statutory factors: "'the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of th[e Speedy Trial Act] and on the administration of justice.'" *Id.* (quoting 18 U.S.C. § 3162(a)(2)). The Court should also consider whether the defendant has suffered any prejudice. *United States v. Wilson*, 11 F.3d 346, 352 (2d Cir. 1993).

Contrary to Mr. Zas's contentions, the crime with which Zedner is charged is serious, the delay is understandable, and reprosecution would have no adverse impact on either the administration of the Speedy Trial Act or on the administration of justice.

A. Seriousness of the Offenses

According to Mr. Zas, "[W]hile no federal crime is trivial, Mr. Zedner's alleged offenses, *the product of mental illness*, are non-violent, caused no harm, and are therefore not as serious as many other federal crimes" (emphasis

added). (Br. at 5). Mr. Zas's claim that Zedner's alleged crimes were the product of a mental illness is shocking. At each of the competency proceedings, Zedner and his attorneys have maintained that Zedner does not suffer from a mental illness. Should this Court rule, once again, that Zedner is mentally unfit, Mr. Zas will no doubt argue to the Court of Appeals, as he did before, that this Court's ruling should be reversed. As for Mr. Zas's reliance on *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983), which Mr. Zas contends is a case similar in its lack of seriousness to Zedner's, Mr. Zas fails to point out that whereas the defendant in *Caparella* was accused of a single act of mail theft, "the lowest order of felony," *id.* at 977, 980, Zedner stands accused of, among other things, repeated attempts to defraud financial institutions with bogus Treasury bonds having a face value of $10 million, a Class B felony punishable by up to 30 years' imprisonment on each count, *see* 18 U.S.C. §§ 1344 and 3559(a)(2). The offenses are serious.

B. Facts and Circumstances Leading to Dismissal

In complete disregard of the procedural history of this case, Mr. Zas claims that "Zedner bears no responsibility for the [speedy trial] violation [and,] on the contrary, in his post-hearing memorandum in support of his competency[,] . . . requested a trial 'as soon as possible.'" Mr. Zas even goes so far as to cite *United States v. Giambrone*, 920 F.2d 176 (2d Cir. 1990), where the defendant "had at all times indicated his own readiness for trial and had opposed the government's requests for delays," *id.* at 182.

As set forth above, when the Government stated that it was ready for trial on January 31, 1997, Zedner replied

that he needed an adjournment. When the Government was ready to try the case on May 5, 1997, Zedner, at the last minute, asked the Court to dismiss his attorney. At the status conference held on December 17, 1997, Zedner asked the Court to adjourn the trial date of January 30, 1998. It was not until October 14, 1998, with a jury panel waiting, that the Court, unable to fathom how Zedner intended to defend himself at trial with the absurd defense that bonds containing misspelled words were genuine, ordered Zedner committed to the custody of the Attorney General for a competency examination.

Zedner's post-hearing memorandum in August 2000, in which he asked for a speedy trial, was the first such request Zedner had ever made, and Mr. Zas knows full well that had the Court ordered Zedner to undergo a new psychiatric evaluation, Zedner would have appealed, which would have further delayed the trial. Mr. Zas is also aware that Zedner's counsel, Tracey Gaffey, was having a high-risk pregnancy and was unable to try the case at any time after late November 2000. No one but Zedner has been responsible for the delay.

C. Impact of Reprosecution

According to Mr. Zas, "administrative concerns" and "other factors" call for dismissal with prejudice because "Zedner's alleged offenses were not the product of criminal intent, but of mental illness," and, "as a result of his bail conditions, his liberty has been impinged and his life disrupted" for a "half-decade." (Br. at 8-9). Once again, Mr. Zas contends that Mr. Zedner's crimes were borne of a mental illness. Once again, he ignores the position of mental fitness Zedner maintained at the two competency hearings. Once again, Mr. Zas complains about the five-year

"delay" since Mr. Zedner's arraignment on the indictment, even though the Government has been ready for trial for years and that the only reasons for the delay have been Zedner's requests for delays and Zedner's borderline insanity.

As the Second Circuit stated in *United States v. Simmons*, 786 F.2d 479, 485 (2d Cir. 1986), "[W]here the violation of the Act was unintentional and the resulting delay was not overly long, and where [the defendant] has not presented evidence of prejudice, [there is no reason to] believe that the administration of justice would be adversely affected by reprosecution." Because Zedner has been charged with having committed serious crimes and has not suffered any prejudice, the administration of justice would not be adversely affected if, following dismissal, he were re-indicted.

CONCLUSION

Zedner has waived his right to make this motion. Nevertheless, if the Court, out of an abundance of caution, dismisses the indictment, the dismissal should be without prejudice.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: /s/ Leonard Lato
Leonard Lato
Assistant U.S. Attorney
Tel: (631) 715-7844
Fax: (631) 715-7922

[Indication Of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA,

-against-

JACOB ZEDNER,

Defendant.

----------X

AFFIRMATION

CR 96-285 (TCP)

LEONARD LATO, an Assistant U.S. Attorney for the Eastern District of New York, states as follows:

1. At all times, I have been the Assistant U.S. Attorney assigned to the captioned case.

2. In late November 2000, Randi Chavis, Esq., an attorney with the Federal Defender Division, informed me that Ms. Gaffey would be out of the office for a few weeks for reasons related to her pregnancy.

3. In late December 2000 or early January 2001, either Ms. Chavis or Ms. Gaffey, or both, informed me that Ms. Gaffey was unlikely to return until some time after Ms. Gaffey gave birth.

4. In or about late January 2001 or early February 2001, I had a telephone conversation with Ms. Gaffey. We discussed the cases we had together, including Zedner. Ms. Gaffey and I agreed that the only case that required attention was that of Anthony Allen, a case assigned to Judge Wexler.

5. At no time did I receive any information from the Federal Defender Division that Zedner desired a speedy trial or that substitute counsel was available to try the case in Ms. Gaffey's absence.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Central Islip, New York
March 22, 2001

/s/ Leonard Lato
LEONARD LATO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,	CR 96-285
v.	United States Courthouse Central Islip, New York
JACOB ZEDNER,	March 30, 2001 9:30 o'clock a.m.
Defendant.	

----------X

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	LORETTA E. LYNCH United States Attorney One Pierrepont Plaza Brooklyn, N.Y. 11201 By: LEONARD LATO, ESQ. Assistant U.S. Attorney
For the Defendant:	THE LEGAL AID SOCIETY FEDERAL DEFENDER DIVISION 52 Duane Street, 10t [sic] Fl. New York, N.Y. 10007 By: EDWARD ZAS, ESQ.
Court Reporter:	Owen M. Wicker, RPR 1180 Federal Plaza Central Islip, N.Y. 11722 (631) 712-6102

Proceedings recorded by mechanical stenography; transcript produced by computer transcription.

[2] (Case called.)

MR. LATO: For the government, Leonard Lato. Good morning, your Honor.

MR. ZAS: For the defendant Jacob Zedner, Edward Zas, your Honor.

THE COURT: I have of [sic] a stay issued from a judge from the court of appeals. From my memo, there is no judgment entered yet pursuant to that, but they may have jurisdiction of this case and of course I will not interfere.

I want to do certain things, though. One, the record should show that Mr. Zas is an appellate attorney. When he last appeared in this Court, as I recall it, he said he did not know how to try a case and did not know how to try this case. The case was assigned by the Legal Aid to Tracey Gaffey who has recently become a mother of a young girl – both sides doing very well – she's not in a position to proceed at the moment. I did issue a memo.

At one point, Ms. Gaffey, as I recall it, agreed there should be a further study of Mr. Zedner and that was the reason we issued the original order. Then we had the competency hearing and it had been my intention at this point to invoke not a four-month or permanent study of him, but pursuant to 4246(b), third sentence, to have him examined for a period of thirty days by a government [3] facility.

As I stated in my memo and order, I'm not a psychiatrist, I'm not a psychologist, nor do I think defense counsel would purport to be such, but I gave the various reasons why I thought we should proceed with caution.

The record should also show that prior to the commencement of the trial on the day of the first competency hearing, defense counsel had served no notice of intention with respect to competency or incompetency required, if any such position was going to be taken during the trial. Defense [sic] basically acquiesced in the Court's decision.

Appellate counsel took the position before the Court of Appeals that Ms. Gaffey was a nonparticipant, which is not exactly true. She was a nonparticipant because her client told her not to participate. My own recommendation would have been today that we send him for a thirty-day study pursuant to that provision in the code.

I did not have in hand at the time I wrote my memorandum anything from the government because they sent their letter in late, and I did get subsequently a letter from the government in which they pointed out some other things that I had not taken into account in my letter.

Do you have a copy of that letter?

[4] MR. LATO: I do not have an extra copy of that with me, your Honor.

THE COURT: I want you to mark that as part of this file because there were added reasons. This is not the letter, but we can do that.

MR. LATO: The one dated March 22nd.

THE COURT: That's my position. I want that position to be taken to the court of appeals when they consider this question of a further stay of these proceedings.

Does the government want to add anything further?

MR. LATO: No, your Honor.

I think by virtue of what's in my letter and the Court's order and the obvious history in this case as reflected in the docket sheet, there is a good record before the court of appeals.

THE COURT: I want it known to the court of appeals that I want them to hear you before they make any decision.

MR. LATO: Then I'll put something on the record. This case, as you know –

THE COURT: I want you to.

I want them to hear you up here as well as there.

MR. LATO: I'll do it in both places, your Honor.

[5] The reason this case hasn't been tried in the last five years is basically twofold.

The first reason is that although the government was ready for trial four years ago, and in fact we were all set to go when we had a trial date, initially Mr. Zedner was saying that he had more time to do among other things, serve subpoenas on Alan Greenspan, William Jefferson Clinton, who at the time was the President of the United States, Chiang Kai-shek, all at the time to have interposed the ludicrous defense that the bonds that had misspellings were genuine.

The Court gave him also [sic] much latitude as he wanted. The Court also declared this case as complex for, among other reasons, the defendant needed time to serve all of these subpoenas. The government was again ready for trial. The defendant again wanted to interpose the

defense that these bonds were genuine, even though the "United States" was spelled wrong on the bonds.

When we were ready for trial the second time, your Honor called both me and Ms. Gaffey into chambers and basically suggested that you had great reservations about the defendant's competency and that although the government believed that the defendant was competent, the government was aware, the Court was aware and agreed to have a competency hearing, but the defendant was in fact [6] not competent to stand trial. And if he was found not competent at this hearing your Honor could send him to Buttner [sic: Butner], North Carolina or some other institution, and after in fact an examination, the institution determined he was not competent, that would be the end of the proceeding.

If on the other hand the institution determined he was competent, perhaps that would allay any fears your Honor had about the defendant's competency.

We attempted to have a competency hearing and at that point because Ms. Gaffey was in an advisory capacity, Mr. Zas felt on appeal that the best thing to do was to have a new competency hearing because Mr. Zedner was denied his right to counsel at a hearing.

The court of appeals agreed.

We came back.

The government's view again, we were always ready for trial, but we were doing whatever we could in this very difficult case because Mr. Zedner still maintained ridiculous positions and no rational jury could possibly credit his defense.

So basically the reason that we're hear [sic] today is that for whatever reason, whether it's strategic or some other reason, I cannot fathom we'll have to go back to the court of appeals again, and regardless of what happens in [7] the court of appeals at this time eventually this case will be tried.

Also Mr. Zas feels there is a speedy trial violation not [-] withstanding that Mr. Zedner waived his right to speedy trial for all time and this was declared a complex case, even if this Court winds up dismissing out of an abundance of caution without prejudice, given the fact that the five-year delay is entirely Mr. Zedner's fault or as a result of his borderline insanity.

So, at some point this case will be tried and the problem with this is that both the government and the Court have really gone out of their way to do what they could for Mr. Zedner because as the Court pointed out about three years ago if he was convicted at trial given the nature of the fraud the Court would have no choice but to put him in jail for several years.

This is one of the cases where basically everyone did something for the defendant short of having him stand trial and going to jail for several years.

That's basically the position I intend to take before the court of appeals, should Mr. Zas say on appeal either we need a new competency hearing or the case should be dismissed for speedy trial violations.

THE COURT: What I'm offering today – of course if he withdraws his appeal, to have him sent down for a [8] thirty-day study according to that statute.

MR. ZAS: Your Honor, may I say –

THE COURT: Say whatever you wish.

MR. ZAS: Thank you, your Honor.

First of all everything I've done in this case, every decision I've made has been part of my good faith effort to represent Mr. Zedner. We all have a job to do in this case –

THE COURT: But you will not be the trial attorney here, as I understand it.

MR. ZAS: I was not going to try this case alone, Judge.

THE COURT: I just want the court of appeals to recognize that Ms. Gaffey – it was at Ms. Gaffey's suggestion as well as mine that we do the competency route. You took it to the court of appeals with a different directive. You can do whatever you want. I can't stop you.

MR. ZAS: Absolutely, your Honor.

May I finish my response?

THE COURT: Yes.

MR. ZAS: Everything I've done has been part of what I felt was, what I feel was, my obligation to give Mr. Zedner the best defense I could give him consistent with the law and the rules of professional conduct.

[9] Now, Mr. Lato is correct. When I first got in the case, I saw the transcript and I saw your Honor's genuine well-founded concerns that Mr. Zedner might not be competent, and you were right. You said how could he believe these bonds were real? No one in their [sic] real mind could believe they were real. You even said if the case were at the Rule 29 stage you might even be inclined

to dismiss because you didn't believe he could be found to form intent here. I wanted to give your Honor that chance to get [sic] that, the Rule 29 stage, to say you're right, he's not a criminal, he may have illness.

THE COURT: Well, let's send him down to Buttner [sic] and is [sic] there the government attorneys will do a thirty-day study.

MR. ZAS: Your Honor, this man –

THE COURT: You don't want to do it?

MR. ZAS: Your Honor, I don't.

THE COURT: The record should show that.

MR. ZAS: I understand.

The reason we don't want to do that [sic] because this man is competent. He doesn't belong in any prison facility. He's able to talk to me, he understands what's happening and he'd like to have a trial, and we said this in August: Let's have a trial soon. The government in my experience never says they don't want to have a trial, [10] that's why they prosecuted. We want to have the trial too.

I've never heard of a situation where the government says we're prosecuting him, we think he's a criminal, but no, no, no, we don't want to try him. We want to have him declared incompetent.

THE COURT: The government doesn't want to be charged at the conclusion of the trial prosecuting somebody who is mentally incompetent.

MR. ZAS: I understand that. I understand that.

THE COURT: Let me send it to the Second Circuit. They obviously have psychologists and psychiatrists. They can make a determination better than we can.

MR. ZAS: That's true, your Honor.

I want to say just personally to your Honor that I have the utmost respect for this Court, and everything I've done is because I felt that it was my obligation to do it, and I would not have been effective –

THE COURT: I'm not criticizing you, although I don't think it's proper for you to say that he was not represented by counsel at the time of the first competency hearing. Ms. Gaffey is a very respected trial lawyer; you are not.

MR. ZAS: That's true, your Honor. I've never tried a criminal case by myself. But, your Honor –

[11] THE COURT: Go ahead to the court of appeals and see how far you get.

MR. ZAS: I'm just trying to make my record for the court of appeals, Judge.

THE COURT: Go ahead.

MR. ZAS: I never said that Ms. Gaffey was not there as advisory counsel; she was.

THE COURT: She was there as a lawyer.

MR. ZAS: Do you think –

THE COURT: He was the one that told her he did not want her to participate.

MR. ZAS: Well, your Honor, I respectfully agree [sic: disagree].

THE COURT: That's on the record.

MR. ZAS: I respectfully agree [sic: disagree].

I think the Second Circuit disagreed before and I think they will disagree again, and I understand your Honor's position.

THE COURT: Good.

MR. ZAS: I would ask because I think the Second Circuit would ask that that they do want your Honor to issue a ruling in the first instance on whether to stay this matter pending the full appeal. I think the order that they issued yesterday was just a temporary stay until April 21st.

THE COURT: No, my position is clear. I want to [12] send him for thirty days, to have a thirty-day study by competent psychiatrists who are in my book unbiased. One way or the other I want a thorough study done of him because I have a great deal of concern for the government to prosecute a man such as this.

I made that offer to you. You are refusing it.

That's your business.

Go ahead.

MR. ZAS: Your Honor, just for clarity, the record is that your Honor is saying that you are denying a stay of your March 21st order pending appeal.

THE COURT: I'm just amending my March 21st order to make that offer to you. I'm not going to stay that.

That offer I want them to reject.

MR. ZAS: Okay.

THE COURT: Okay.

MR. ZAS: Thank you.

(Whereupon, the proceedings were adjourned.)

[LOGO]

U.S. Department of Justice

United States Attorney
Eastern District of New York

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United States Attorney's Office
610 Federal Plaza
Central Islip, New York 11722-4454

April 2, 2003

The Honorable Thomas C. Platt
United States District Judge
Eastern District of New York
1044 Federal Plaza
Central Islip, NY 11722

Re: United States v. Jacob Zedner
CR 96-285 (TCP)

Dear Judge Platt:

The Government submits this letter to request that the Court hold a status conference at 10:30 a.m. on April 3, 2003. At the conference, the Government will move to dismiss the indictment without prejudice. If the Court grants the motion, the Government will ask a grand jury to re-indict Zedner on principally the same charges contained in the original indictment.

On or about March 7, 2001, Zedner, through attorney Edward Zas, moved to dismiss the indictment on speedy-trial grounds. (Docket Sheet Entry 126). The Court denied the motion on or about March 21, 2001. (*Id.*, Entry 128). If Zedner is convicted, Mr. Zas will argue to the Court of Appeals that this Court's ruling was incorrect. If Zedner's conviction is reversed on appeal, another year in this old case will have been lost.

Dismissal and re-indictment will not affect the April 7 trial date. Zedner's trial counsel, Tracey Gaffey, has informed me that she will still be ready for trial on April 7.

Respectfully submitted,

ROSLYNN R. MAUSKOPF
United States Attorney

By: /s/ Leonard Lato
Leonard Lato
Assistant U.S. Attorney

cc: Tracey Eadie Gaffey, Esq.
By Fax (631-712-6505)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,	:	CR 96-285
	:	U.S. Courthouse
	:	Central Islip, New York
v.	:	
JACOB ZEDNER,	:	TRANSCRIPT OF PROCEEDINGS
	:	
Defendant.	:	April 3, 2003
	:	10:30 a.m.

----------X

BEFORE:

HONORABLE THOMAS C. PLATT, U.S.D.J.

APPEARANCES:

For the Government: ROSLYNN R. MAUSKOPF
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: LEONARD LATO, ESQ.
Assistant U.S. Attorney

For the Defendant: THE LEGAL AID SOCIETY
Federal Defender Unit
100 Federal Plaza
Central Islip, New York 11722
By: TRACEY GAFFEY, ESQ.

Court Reporter: HARRY RAPAPORT, C.S.R.
U.S. District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography. Transcript produced by computer-assisted transcription.

[2] THE CLERK: Calling CR 96-285, United States v. Jacob Zedner.

MR. LATO: For the government, Leonard Lato.

Good morning.

MS. GAFFFEY: Tracey Gaffey for the public defender.

THE COURT: First of all, both sides ready for Monday morning?

MR. LATO: The government is ready. Yes, your Honor.

MS. GAFFFEY: Your Honor, I might have a problem with one witness. I am not quite sure. If the Court will allow me, I would like to revisit the matter at the end of the day. You know the witness, Dr. Drob, D R O B. He testified at our last competency hearing. I am planning on calling him as our witness. I spoke with him this morning. He had just recently gotten back from vacation. And before I was cutoff on the cell phone, he was trying to tell me that he was testifying in another case, and that must have been moved. So he might have a problem with next week. And since I don't have all the details and we were cutoff and I couldn't get him, and I couldn't raise him again. I am not sure of the problem. I am hoping we can, because I don't want to ask that this case be adjourned. And if I can have until the end of today to [3] reach Dr. Drob again.

THE COURT: You can't do it now?

MS. GAFFFEY: I tried right before I came to the Court. I tried both his numbers in my office before I came in here.

THE COURT: And he doesn't answer?

MS. GAFFFEY: I left two messages. One on the cell phone, and one on the hospital phone at Bellevue.

MR. LATO: Your Honor, with the Court's permission, while I try – I will try to accommodate Dr. Drob, I would consent to him testifying at any point, so if we can interrupt the government's case to accommodate him, subject to the Court's approval, fine.

THE COURT: That's accommodating.

Do you wish to call him right now here and leave him a message from here?

MS. GAFFFEY: I would do that, except, I didn't bring his two numbers with me. Although I can go back to my office and get them fairly easily.

THE COURT: Can you call the office and have them give you the number here?

MS. GAFFFEY: Yes, your Honor. That's what I am trying to do.

THE COURT: Do you have the number?

MS. GAFFFEY: I have it in my office?

[4] THE COURT: Do you have a number here where she can call and leave an alternate number?

THE CLERK: The courtroom number.

THE COURT: She can call this number from your office.

MS. GAFFFEY: Yes, your Honor.

THE COURT: The next question I have, and assuming arguendo we are going ahead on Monday, what does the government think we will need by way of the number of jurors?

MR. LATO: I think we called the standard 40 to 50, and that should be sufficient. This case doesn't involve drugs or organized crime or anything unusual, I don't see a large number of jurors saying they need to be excused for personal reasons.

However, the caveat to that is during – there will be testimony that Mr. Zedner made certain statements that could certainly offend certain members of society. For instance, there will be a witness who will testify that Mr. Zedner said one of the reasons there were spelling errors on the bond is because there were minorities or a lot of blacks working for the government where they can do those type of things.

I can see certain people being offended, so –

THE COURT: If you call 50 and then you can get [5] 30. So we need to call 50. And unless it is part of a much larger pool?

THE CLERK: I believe we may be the only jury.

THE COURT: I think if we wish to have 50, you may have to call about 75 or 80.

MS. GAFFFEY: I tend to agree with that, and not for the reasons Mr. Lato stated, but in this day and age people are a little more open, and they may know people who suffer from some sort of mental illness or emotional stability [sic]. And that may prompt –

THE COURT: We will put in an order for a hundred. You tell the jury clerk that if we put in for 100 we should get at least 50. Or he can translate it any way he wants – he or she wants. But we are hoping to have at least 50 available.

And there was the second consideration, as to how long the case will go for trial. Because the following week we are into the Passover and Easter week.

MR. LATO: Your Honor, I intend to rest late Tuesday or early Wednesday. My case will be very fast.

THE COURT: You have a whole slough of organizations here.

MR. LATO: Yes, your Honor. But I have no cooperators. And the way the issue is framed in this case, the whole issue in the trial is not whether [6] Mr. Zedner did these things, but did he have the requisite mens rea for fraudulent intent, and that's why as part of the defense case we will have Dr. Drob who will testify that Mr. Zedner is partly delusional and may actually have believed the bonds is genuine, so the cross of my witnesses will be rather brief.

THE COURT: You are going to call all seven banks or financial institutions?.

MR. LATO: I will actually call six. The Merrill Lynch account I will drop. The witness there disappeared and no one else dealt with Mr. Zedner.

THE COURT: All right.

MR. LATO: And I will also drop the counterfeiting count, the final count.

THE COURT: The second count, count eight?

MR. LATO: Count eight, yes.

THE COURT: All right.

And that will be in the superseding indictment which you hope to have handed up at some point. And have you discussed it with Ms. Gaffey?

MR. LATO: There is a twist on that, I also discussed it with Mr. Zas this morning, and I was unable to get a hold of him this morning.

Mr. Zas is correct, if the government moves to dismiss with respect to the old speedy trial clock it will [7] not help. The only way I can cure any potential speedy trial problem is if the defense maintains the position that there is a speedy trial problem. So, I am essentially putting the onus on Ms. Gaffey and Mr. Zas, because I know it was his motion originally. He thought this up.

The Court already ruled there was no speedy trial violation. However, I want to know if that's still Ms. Gaffey's position? Is there or is there not a speedy trial violation?

If Ms. Gaffey's position is that there is, the Court can dismiss this indictment without prejudice, and I am free to indict this afternoon.

If Ms. Gaffey states there is no speedy trial problem, then it is waived and I will proceed under the old indictment. But I cannot move to dismiss. That does not solve the problem, my motion to dismiss will not resolve the potential problem.

And I think we will be okay in the Court of Appeals based on your Honor's waiver for all time. And the last thing I want to do is in the year 2004 or 2005 to be back here to try this again.

THE COURT: I have stated previously that the burden is on the defendant when he or she consents to a waiver of all time. So if it were a complex case, they do [8] not change their position as to the waiver, and if it is no longer a complex case and they want to go to trial. And Mr. Zas refused to come down here to try the case, because he said he didn't know how to try a case.

MR. LATO: If I recall correctly Mr. Zas's position is the waiver of all time is not valid, the Court cannot do it. So it is not that his position has changed.

It is my request now in any event to put the onus on Ms. Gaffey.

THE COURT: It is very simple, Ms. Gaffey. My position on the waiver is under the statute. If you examine it carefully, you and your client may waive by simply not raising the question before a jury is selected. That's clear. The Second Circuit took another view of that, and said they didn't realize that can be done. In the meanwhile I formulated the view that if you can waive by inaction, you can waive it permanently.

As long as the defendant understood when they agreed or instigated the waiver for all time that they had the right to change their mind as long as they notified the Court they wanted an immediate trial, and then I would make the government go to trial immediately.

But, given that I always understood that your office's position would be the same way if they would abide by

that. But nothing seems to be permanent in this [9] world any more, as most things. And I do know what your position is today.

MS. GAFFFEY: Your Honor, first, I would like to know what posture we are in. I am not moving to reargue. Mr. Lato is not saying he is not moving to dismiss. Our motion was filed some time ago with the Court and denied.

THE COURT: Yes. I denied that. But there was never any notification by this Court that you were ready for trial. Indeed, a lot of water is now flowing over the damn since that event occurred.

MR. LATO: Your Honor, if I can make the following suggestion. I am doing it just as an attempt – again, I have great respect and affection for Ms. Gaffey and I am trying to pin her down.

Is it her position that speedy trial has been violated? Yes or no, at this point? I just need to know that. And I don't know if she is going to want to answer that.

MS. GAFFFEY: As a friend, I know what Mr. Lato is saying. I know what he is trying to do. But once again, I ask what is our posture? The defense isn't going to reargue. The government is not moving to dismiss the indictment. Our papers had been filed and denied. We don't withdraw them.

THE COURT: Well, anything that happens [10] subsequent to the original motion –

MS. GAFFFEY: Is your Honor asking me if I am making a speedy trial motion subsequent to the factual bases alleged in the original motion?

THE COURT: Yes.

MS. GAFFFEY: I am not making a new speedy trial motion today, no. I am not withdrawing the old one either.

THE COURT: I don't think we have violated the speedy trial rights the waiver was entered into in writing. And his appellate lawyer from the same office who told me he couldn't try the case because he didn't know how to try the case, attempted to get some sort of strategic advantage by making that motion. Evidently he was certainly not ready to try the case at that time, and I denied it.

Because the competency questions, I don't think it can be raised again.

MR. LATO: So, it is settled, we are going to trial on the old indictment.

THE COURT: He can raise it again if he wishes, but my position has been stated.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CENTRAL ISLIP DIVISION

UNITED STATES OF AMERICA

vs.

JACOB ZEDNER

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: CR-96-285

Defendant's Attorney: Tracey Gaffey

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) ONE, TWO, FOUR, FIVE, SIX, and SEVEN after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
18 USC 1344	**Bank Fraud, a Class B Felony**		1, 2, 4-7

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) THREE and EIGHT were dismissed on the motion of the United States at the beginning of trial.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security Number:
122-78-0006

Defendant's Date of Birth:
August 7, 1954

Defendant's USM No.: 46534-053

Defendant's Residence Address:
In custody
72 Hicks Lane
Great Neck, NY

Defendant's Mailing Address: ____

Date of Imposition of Sentence: **1/22/2004**

/s/ Thomas C. Platt
THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

Date: January 23, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SIXTY-THREE (63) MONTHS, on each count to run concurrent. The defendant is given credit for time served and for time in the custody of the Bureau of Prisons for psychiatric evaluations.**

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on ___. If the defendant is not designated within the given time frame he/she should surrender to the Marshals office in Brooklyn. If the defendant has not already done so at the time of sentence he/she should communicate with the Marshals office to obtain information regarding the procedures for voluntary surrender.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

_____
By Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to any substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	**$ 300.00**	**$**	**$**

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

☐ The defendant shall make restitution to the following victims in the amounts listed below:

☐ Restitution is ordered jointly and severally with:

or

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order Percentage of Payment
Totals:	$_____	$_____	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary):

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 25

Criminal History Category: II

Imprisonment Range: 63 to 78 months

Supervised Release Range: 3 to 5 years

Fine Range: $10,000 to $1,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution $

☐ The court finds pursuant to 18 U.S.C. § 3664(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

☐ Restitution is not ordered because:

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not be appropriate.

☐ the defendant was convicted of qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i); pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii), it has been determined that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A(c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A), the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

☐ The defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A(c)(1)(A)(ii), and pursuant to 18 U.S.C. § 3663A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the follow [sic] reason(s):

OR

The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: April 28, 2004 Decided: March 8, 2005
Errata Filed: March 15, 2005
2nd Errata Filed: March 23, 2005)

Docket No. 04-0821-cr

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UNITED STATES
OF AMERICA,

Appellee,

-v.-

JACOB ZEDNER,

Defendant-Appellant.

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Before: LEVAL and RAGGI, *Circuit Judges,* and STEIN, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) convicting Defendant-Appellant Jacob Zedner of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and sentencing him to 63 months' imprisonment. The Court of Appeals (Leval, J.) holds that (1) any Speedy Trial Act error was harmless; (2) Speedy Trial Clause of the Constitution was not violated; (3) district court did not abuse its discretion in admitting evidence of other bad acts; (4) the conscious avoidance

* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

charge did not constitute plain error; and (5) substantial risk existed that district court misapprehended its authority to depart downward. Conviction AFFIRMED. Sentence VACATED and REMANDED.

Stephen C. King, Assistant United States Attorney for the Eastern District of New York (Roslynn R. Mauskopf, United States Attorney, Emily Berger, Assistant United States Attorney, on brief), Brooklyn, NY, for *Appellee*.

Edward S. Zas, The Legal Aid Society, Federal Defender Division, Appeals Bureau, New York, NY, for *Defendant-Appellant*.

LEVAL, *Circuit Judge*:

Jacob Zedner appeals from his conviction after a jury trial in the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) on six counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344. Zedner claims, *inter alia*, that (1) lapses of time between the indictment and the start of trial violated his statutory and constitutional rights to a speedy trial; (2) the district court abused its discretion when it admitted evidence of his other bad acts; (3) the district court charged the jury incorrectly on conscious avoidance; (4) the court erred in the calculation of intended loss under U.S.S.G. § 2F1.1; (5) the district court misapprehended its authority to depart downward for diminished mental capacity and the loss amount's overstatement of the seriousness of the offense; and (6) the court erred in following the United States Sentencing Guidelines, which unconstitutionally deprive the defendant of the right to a

jury trial. We reject contentions (1) through (4); we agree with defendant's contention (5), which requires resentencing and moots contention (6).

BACKGROUND

In March 1996, Jacob Zedner approached a number of financial institutions to open an account using a counterfeit $10 million bond, ostensibly issued by the non-existent "Ministry of Finance of U.S.A." The bond contained numerous spelling mistakes and other errors.

The institutions uniformly refused to open an account for Zedner. One called the United States Secret Service, which arrested Zedner on March 12, 1996. A consensual search of Zedner's briefcase revealed three additional counterfeit bonds, each in the amount of $10 million, which, like the one he attempted to negotiate, were replete with mistakes.[1] The grand jury indicted Zedner on April 4, 1996 on various counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and one count of knowingly possessing counterfeit bonds in violation of 18 U.S.C. § 472.

At the first status conference on June 7, 1996, Zedner's then-attorney failed to appear, and the district court entered an order excluding the delay until the next conference on June 21, 1996, under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. At the second status conference,

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[1] Some of the bonds referred to the United States as the "Onited States" and "Thunted States," misspelled Philadelphia as "Dhtladelphla," misspelled Chicago as "Cgicago," referred to the month August as "Augit" and "Auouit," misspelled the word dollar, and claimed to have a duration of "forevev."

Zedner failed to appear, and the proceedings were again delayed until June 26, 1996. On June 26, the court entered an order excluding delay from June 26 through September 6, 1996, by reason of the complexity of the case. On September 6, the case was again adjourned, and the court excluded the delay until November 8, 1996.

On November 8, Zedner requested an adjournment of the case through the end of January. Because the court had lengthy trials pending, the judge expressed concern that Zedner might attempt to invoke speedy trial rights at an inconvenient time and insisted on a "waiver for all time" as a condition of granting the adjournment Zedner requested. The court advised Zedner of his rights, and Zedner executed a written waiver. The district court then entered an order of adjournment to January 31, 1997. Presumably because Zedner had signed a waiver of rights under the Speedy Trial Act "for all time," the judge entered no more orders of exclusion for the duration of the case.

On January 31, 1997, the government answered ready for trial, but Zedner's counsel requested another delay. The district court granted the request and scheduled jury selection for May 5. On May 2, Zedner's counsel, James Hagney, Esq., requested to be relieved on the ground that Zedner wished to assert a defense at trial that counsel believed not to have a "basis in law or fact," namely that the bonds were genuine. The court initially denied Hagney's motion but asked a representative of the Federal Defender Division of the Legal Aid Society to serve as advisory counsel. After Zedner's subsequent completion of a financial affidavit, the court relieved Mr. Hagney and appointed the Federal Defender Division of the Legal Aid Society as Zedner's counsel.

At the May 2 hearing, the court asked Zedner whether he would be willing to submit to a psychiatric examination. With Zedner's consent, the government arranged for an examination, and the court postponed the trial date while awaiting the psychiatrist's report. The psychiatrist issued her report on August 5, 1997, concluding that Zedner was competent to stand trial.

At a status conference on September 8, 1997, Zedner complained about his new attorney and asked to represent himself without an attorney. The court authorized Zedner to proceed *pro se* with the Federal Defender Division of the Legal Aid Society serving in an advisory capacity. Zedner then sought to serve subpoenas on numerous high government officials including President Clinton, Federal Reserve Chairman Alan Greenspan, Attorney General Janet Reno, and Secretary of State Madeleine Albright. While a magistrate judge was considering various motions to quash Zedner's subpoenas, Zedner moved to dismiss the indictment on the grounds that the government had violated his civil rights and that the agents who investigated him were guilty of treason.

At the status conference on December 17, 1997, the court once again scheduled jury selection, for February 17, 1998. However, on January 30, 1998, Zedner asked the court to adjourn the trial date to allow him to serve additional subpoenas on "The Treasury Department of Treasury International Corporation" and other nonexistent entities. Over the next eight months, the court granted many motions to quash subpoenas while Zedner continued to file motions and request subpoenas for parties unconnected to his case. On October 8, 1998, the court scheduled jury selection for October 14.

The morning the trial was scheduled to begin the court consulted with counsel in chambers while a jury panel waited. The court expressed concern that Zedner was mentally ill. The government disagreed, but moved for a psychiatric examination under 18 U.S.C. § 4241(a) in order to allay the court's concerns. The court dismissed the jury panel and inquired into Zedner's competency, concluding that Zedner was not competent to stand trial. Several days later the court ordered Zedner committed to the custody of the Attorney General for hospitalization and treatment pursuant to 18 U.S.C. § 4241(d). Zedner filed an interlocutory appeal, and in *United States v. Zedner (Zedner I)*, 193 F.3d 562 (2d Cir. 1999) (per curiam), we vacated the order of commitment and remanded for a new competency hearing on the ground that a competency hearing of a person whose competence is reasonably doubted should not proceed with that person acting as his own attorney.

The district court convened a status conference on April 4, 2000, but only the government appeared. At the rescheduled status conference held on April 27, 2000, the government and Tracey Gaffey, Esq. of the Federal Defender Division of the Legal Aid Society, now acting on Zedner's behalf, jointly requested that the court schedule the new competency hearing for July 10, 2000. The court complied, and the hearing was held as scheduled in July. At the close of the hearing, the court invited the parties to submit additional briefs on the issue of Zedner's competency. Ms. Gaffey submitted a brief on August 4 arguing that Zedner was competent to stand trial and requesting that the court schedule the case for trial "as soon as possible." The government filed a letter brief on August 11,

2000 taking the position that Zedner was incompetent to stand trial. Zedner filed a *pro se* brief on August 23, 2000.

In November, however, while the competency motion was on submission, Ms. Gaffey became unavailable to try the case for medical reasons relating to her pregnancy. Assistant U.S. Attorney Leonard Lato explained in a later affidavit that he received a phone call in late November 2000 from the Federal Defender Division of the Legal Aid Society informing him that "Ms. Gaffey would be out of the office for a few weeks for reasons related to her pregnancy." Lato was subsequently advised that "Ms. Gaffey was unlikely to return until some time after Ms. Gaffey gave birth." A month later, Lato discussed Zedner's case with Gaffey and the two agreed that the case did not require immediate attention.[2] On March 7, 2001, Zedner moved to dismiss the indictment with prejudice under the Speedy Trial Act and the Speedy Trial Clause of the Sixth Amendment. The court issued a memorandum order on March 21, 2001 denying Zedner's motions on the grounds that the case was complex and Zedner had waived his speedy trial rights "for all time."

Returning to the issue that was submitted to the court by the August briefing, the court found Zedner incompetent to stand trial and ordered him to surrender to the Attorney General for commitment. Zedner appealed, and we affirmed. *United States v. Zedner (Zedner II)*, 29 Fed. Appx. 711 (2d Cir. Feb. 21, 2002).

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[2] Although the record apparently is silent on the subject, we can confidently assume that the trial court was notified of the fact of Ms. Gaffey's prolonged unavailability.

In May 2002, Zedner entered a federal medical facility for psychological evaluation. Near the end of his commitment, Zedner moved to extend his stay by 90 days to allow for a more comprehensive evaluation. On August 27, 2002, Zedner was released. The institution's report found that Zedner was delusional but competent to stand trial. The district court accepted the report and scheduled jury selection to begin on April 7, 2003.

The trial focused primarily on Zedner's state of mind with respect to six efforts to open a bank account using a bogus bond. The government called representatives from the various financial institutions Zedner had approached, as well as a Secret Service agent, who testified that at the time of his arrest Zedner possessed credit cards and calling cards in at least five different names. Representatives of Citibank and American Express testified that the cards had uncollectible balances exceeding $13,000. In an effort to prove absence of fraudulent intent, the defense called as its only witness a psychologist who testified that Zedner suffered from a delusional disorder and genuinely believed the bonds he possessed were authentic. The government called two rebuttal witnesses. Both witnesses told similar stories of contacting Zedner in 1988 seeking assistance in the refinancing of a mortgage on her home. In each instance, Zedner transferred title to the home into his own name. Each witness testified that she had been obligated to sue to recover title to her house.

The jury convicted Zedner on six counts of fraud, each representing a separate attempt to open a financial account funded by a phony bond. In the presentence report, the Probation Department, using the 1995 version of the Guidelines Manual, which was in effect at the time of Zedner's crime, determined that his base offense level

was 6. It recommended adding two offense levels for more than minimal planning pursuant to U.S.S.G. § 2F1.1(b)(2)(A) and seventeen levels pursuant to U.S.S.G. § 2F1.1(b)(1)(R) based on a total intended loss of $40,013,285.19.

Zedner challenged the loss calculation. He also moved for a downward departure on grounds of diminished mental capacity and that the aggregate intended loss overstated the seriousness of his offense.

The court denied all of Zedner's motions. With respect to intended loss, the court set the level at approximately $60 million based on Zedner's six attempts to pass off a bond with a face value of $10 million. The court declined to grant a downward departure, explaining on the issue of diminished capacity that the jury had rejected the argument that, by reason of his delusions, Zedner did not possess the requisite *mens rea* during the commission of his crime. The court sentenced Zedner to 63 months in prison, with credit for time served during his competency exam, and 5 years of supervised release. It also imposed a mandatory special assessment of $300.

Zedner then brought this appeal.

DISCUSSION

I. Speedy Trial Act

Zedner claims that his rights under the Speedy Trial Act were violated based on two periods of delay: (1) January 31, 1997 until May 2, 1997, during which the district court entered no order of exclusion while postponing trial at Zedner's request; and (2) August 11, 2000 until March 7, 2001, a period in which Zedner's competence to stand trial was in question and Zedner's attorney became unavailable

because of pregnancy complications. As to both periods, we reject Zedner's contentions.

The Speedy Trial Act provides that the trial of a defendant must commence within seventy days from the date he is indicted or brought before a judicial officer, whichever occurs later, 18 U.S.C. § 3161(c)(1), failing which § 3162(a)(2) directs dismissal of the indictment. In counting the passage of seventy days, however, the district court may exclude certain periods of time as specified in § 3161(h). For example, the speedy trial calculation does not include "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant," § 3161(h)(1)(A); "delay resulting from any interlocutory appeal," § 3161(h)(1)(E); certain delay related to pretrial motions, § 3161(h)(1)(F); reasonable delays up to 30 days while any question is under advisement, § 3161(h)(1)(J); "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4); or any period of delay for which the district court finds on the record that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," § 3161(h)(8). Although seven years passed between Zedner's indictment and the start of his trial, most of the delay falls squarely within one of these statutory grounds for exclusion.

The exclusions contained in §§ 3161(h)(1)-(7) are, for the most part, self-executing, but § 3161(h)(8) provides that no exclusion based on the "ends of justice" shall be valid "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant

in a speedy trial." The district court followed this procedure throughout 1996, entering several orders of exclusion based on the failure of Zedner's counsel to appear, the failure of Zedner to appear, and the complexity of the case. After several continuances, however, the court grew concerned that Zedner might invoke the delays he caused or requested as the basis for a motion to dismiss the indictment under the Speedy Trial Act. When counsel for Zedner requested a three-month adjournment of the case in November 1996, the district court responded, "I think if I'm going to give you that long an adjournment, I will have to take a [speedy trial] waiver for all time. . . . I have some big cases and if I get bogged down with them you may be a long while before you get a trial." The defendant agreed to the request. His counsel assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this ease." Thereafter, the court spoke directly to Zedner. It informed him, "I'm prepared to start your trial right away," and warned, "I have some fairly big cases pending in my docket, one of which is set to take eight months for trial. If you get locked in, if that starts before you start, you may have to wait until that is done." Zedner then executed both an oral and written waiver of his speedy trial rights "for all time." Thereafter, the district court did not enter any orders of exclusion based on its assumption that the waiver "for all time" removed all speedy trial issues from the case.

A. Period from January 31, 1997 to May 2, 1997

Zedner alleges that the lapse of over 90 days between January 31, 1997 to May 2, 1997 (a period which exceeds the seventy days allowed by the Act) requires dismissal of the indictment. In denying Zedner's motion under the

Speedy Trial Act, the district court relied on Zedner's waiver of his speedy trial rights "for all time." However, in *United States v. Gambino,* 59 F.3d 353 (2d Cir. 1995), we ruled, like other circuits, that a defendant's waiver of rights under the Speedy Trial Act may be ineffective. *Id.* at 360. We observed that the public has a strong and independent interest in the expeditious prosecution of criminal cases. That public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver.

At the same time, however, in an effort to reach a reasonable balance between the interests of the public and of the defendant, we recognized in dictum an exception to the non-waiver rule "when defendant's conduct causes or contributes to a period of delay." *Id.* Such an exception had been previously crafted by the First Circuit in *United States v. Pringle,* 751 F.2d 419, 434 (1st Cir. 1984). In *Pringle*, a defendant sought three continuances. The third motion stated that the defendants "waive their rights to a speedy trial." *Id.* at 433. The district court granted the motion and scheduled trial for two months later. *Id.* However, the trial was not held, and an additional five months passed before the filing of a motion stopped the speedy trial clock. *Id.* at 434. The record contained no explanation for the delay, and the First Circuit remanded the case to determine the cause. *Id.* at 436. It instructed the district court to exclude the five-month period from the speedy trial calculation if the district court determined on remand that the defendants' request for delay and purported waiver had induced the delay. *Id.* at 435. The First Circuit expressed concern that a contrary ruling would reward the defendants because "[i]n essence, defendants would have successfully worked both sides of the street,

lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal." *Id.* at 434.

The Seventh Circuit aired similar reasoning in *United States v. Kucik*, 909 F.2d 206 (7th Cir. 1990). As an alternative holding rejecting the defendant's speedy trial claim, the court explained, expressing approval of *Pringle*, that a defendant who "actively participates in a continuance" cannot "then 'sand-bag' the court and the government by counting that time in a speedy trial motion." *Id.* at 211.

The Fifth Circuit rejected that reasoning in *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992). Willis, who was unrepresented by counsel at the time, requested additional time to prepare for trial and, at the prompting of the district court, waived his speedy trial rights. *Id.* at 62. The district court then granted an open-ended continuance until Willis indicated he was ready for trial. Willis later moved to dismiss the indictment based on the resulting period of delay. Despite earlier Fifth Circuit dictum approving of *Pringle*, *see United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989), the court expressed concern that a broad exception would swallow the non-waiver rule. It agreed that "the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous to seek dismissal under the Act." *Willis*, 958 F.2d at 64. But it concluded that a "district court is not sandbagged or otherwise misled . . . by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." *Id.* The court worried that the non-waiver rule would be "meaningless if . . . the defendant waives his

ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." *Id.* It therefore charged district courts with the responsibility of ensuring that any request for a continuance, even one sought or agreed to by the defendant, fall within one of the exceptions contained in the Speedy Trial Act. *Id.*

The Fourth Circuit adopted yet another approach in *United. States v. Keith*, 42 F.3d 234 (4th Cir. 1994). The delay in *Keith* came about when the Assistant United States Attorney fell ill several days before trial was scheduled to start. *Id.* at 236. The district court granted the government's motion for a continuance in a written order that was signed by defense counsel as "[s]een and agreed." *Id.* (alteration in original). The defense attorney later reversed course and moved to dismiss the indictment on speedy trial grounds immediately before the rescheduled trial was set to begin. After concluding that the order granting the continuance failed to meet the procedural requirements of the § 3161(h)(8) "ends of justice" exception, the Fourth Circuit turned its attention to the question of whether the defendant could use the delay acquiesced to by his counsel in support of his Speedy Trial Act claim. *Id.* at 238. The Fourth Circuit expressed concern about the breadth of the rule announced in *Pringle* and *Kucik*, which "would appear to find a waiver when a defendant consents to a continuance occasioned on *any* reason, including the district judge's desire to go fishing." *Id.* at 239. At the same time, the Fourth Circuit characterized the rule in *Willis* as "too narrow." *Id.* The Fourth Circuit instead adopted a middle position, concluding that "if a defendant affirmatively consents to a motion for a continuance and the reasons for the granting of that motion as garnered from the record are sufficient to

support a finding that the ends of justice would be met by granting the motion, the defendant cannot take advantage of that discrete period of time covered by the continuance in asserting a violation of the Speedy Trial Act." *Id.* at 240.

We agree with the Fourth Circuit that the approach taken by the Fifth Circuit in *Willis* does not strike the right balance. We very much doubt that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request. In our view the public interest is not advanced either by allowing such a defendant to escape prosecution altogether, or by dismissing the indictment and reindicting with consequent wasteful reprosecution after a substantial additional delay. *But see United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983).

We need not define the exact scope of the exception to the non-waiver rule in order to decide the case before us. At the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless whether the court made an "ends of justice" finding under § 3161(h)(8).

On January 31, 1997, the government stated that it was ready to proceed to trial. Counsel for Zedner, however, indicated that he was not ready for trial and requested a continuance. The court granted the request and delayed jury selection until May 5, 1997. Given the complexity of the case and Zedner's reasonable need for additional preparations, there can be no doubt that the district court could have properly excluded this period of time based on the ends of justice. Zedner therefore cannot establish a

Speedy Trial Act violation based on the grant of the delay he requested. His claim regarding January 31, 1997 to May 2, 1997 fails.[3]

B. Period from August 2000 to March 7, 2001

Zedner also alleges that the court's failure to start his trial between August 2000 and March 7, 2001, requires dismissal of the indictment. We reject his contention. Zedner could not have been tried in this period, for two reasons.[4]

First, as noted above, beginning in late November 2000, Zedner's counsel Ms. Gaffey became unavailable for trial by reason of complications resulting from her pregnancy. Ms. Gaffey's Federal Defender office advised the AUSA first that she would be out for a few weeks, and later that her unavailability would continue until some time after she gave birth. The court could not have started trial at a time when the defendant's lawyer would have been unavailable to participate.[5]

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[3] Notwithstanding this ruling, district courts contemplating adjournment of trial are far better advised to make prospective "ends of justice" findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers "for all time" seems particularly inadvisable. *See Gambino*, 59 F.3d at 359-60.

[4] We note in passing that the first thirty days after the August 23 filing of Zedner's *pro se* brief addressing his competency to stand trial clearly fall under 18 U.S.C. § 3161(h)(1)(J), which excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

[5] Of course, a district court has discretion to replace a court-appointed attorney whose unavailability will be extensive. Similarly, it may require a defendant whose retained counsel is unavailable to defend a case on the reasonable schedule established by the court to secure the services of another attorney.

In addition, Zedner could not have been tried in this period because he was not competent to stand trial. The question of his competence was submitted in August 2000. The court held the matter under advisement for some time, but eventually found Zedner incompetent and ordered him committed. We affirmed that decision on appeal. *Zedner II,* 29 Fed. Appx. at 713. No court conferences were held during this time, perhaps because the court considered it useless to convene a conference knowing that Zedner's counsel would not be able to appear.

It might be argued on Zedner's behalf that this time during which he was not competent may not be excluded because, so far as the record reflects, the delay did not *result from* the fact that he was incompetent. Section 3161(h)(4) excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." The argument might be made that the court's failure either to make a record that the delay resulted from the defendant's incompetence or to start trial was at least potentially a technical violation of the Act.

The question would then be whether a defendant is entitled to have his conviction voided and the indictment dismissed by reason of the court's failure to begin trial at a time when the court could not have begun trial because the defendant was incompetent, as well as because the defendant's counsel was unavailable for trial. The failure to start trial when the defendant could not have been tried was, at worst, a harmless, technical error, and, in our view, cannot justify vacating the conviction and dismissing the indictment.

Zedner argues that a violation of the Speedy Trial Act's 70-day period for bringing a defendant to trial cannot be deemed harmless, and that dismissal of the indictment is the mandatory remedy for any violation of the statute. We disagree. As explained below, recognition of the distinction between harmless error and error affecting substantial rights furthers, rather than detracts from, the purposes of the Speedy Trial Act

While it is true that, in some speedy trial cases, we have directed dismissal of the indictment without discussing harmless error analysis, *see, e.g., United States v. Kelly*, 45 F.3d 45, 48 (2d Cir. 1995) (per curiam) (remanding to district court to determine whether dismissal should be with or without prejudice); *United States v. Simmons*, 786 F.2d 479, 486 (2d Cir. 1986) (instructing district court to dismiss indictment without prejudice); *United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985) (dismissing indictment without prejudice), we held in *Gambino* that the failure to bring the defendant to trial within 70 non-excludable days from the filing of the indictment constituted harmless error. 59 F.3d at 363. In addition, at least three circuits have required a showing of prejudice when reviewing alleged violations of the Speedy Trial Act's requirement that defendants be given at least 30 days to prepare between indictment and the start of trial. *See, e.g., United States v. Edwards*, 211 F.3d 1355, 1358 (11th Cir. 2000); *United States v. Cisneros*, 112 F.3d 1272, 1277 n.3 (5th Cir. 1997); *United States v. Grosshans*, 821 F.2d 1247, 1252-53 (6th Cir. 1987).

We acknowledge that these precedents do not necessarily resolve the question. There are differences. In *Gambino* the defendant had conceded that reindictment "would have been inevitable" following dismissal of the

original indictment without prejudice. *Gambino*, 59 F.3d at 363. Furthermore, the exercise of statutory interpretation in the case of a violation of the 30-day preparation period required by § 3161(c)(2) is not precisely identical to that for violation of the 70-day requirement of § 3161(c)(1). Section 3162(a)(2) provides on its face that the "indictment . . . shall be dismissed" if the "defendant is not brought to trial within the time limit required by 3161(c)." The Speedy Trial Act does not contain a remedy expressly directed to failure to allow the defendant 30 days for preparation as required by § 3161(c)(2).

Nonetheless, we conclude that harmless error analysis is appropriate in Speedy Trial Act cases because of that statute's relationship to other governing statutes and rules (as well as because Congress could not reasonably have intended the absurd results that otherwise follow). Section 2111 of Title 28, United States Code, instructs appellate courts to "give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly instructs courts to disregard "[a]ny error, defect, irregularity, or variance that does not affect substantial rights." The Speedy Trial Act does not indicate that these normative principles should be disregarded, and we can see no reason why they should be.

There are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful. Delay unquestionably can be prejudicial to an accused defendant. It can result in faded or lost memories, or even the death or other unavailability of witnesses. Likewise, in some circumstances, delay can be prejudicial to the public interest protected by the Act. On the other hand, failure to consider the harmlessness of

certain errors under the Speedy Trial Act can result in perverse outcomes, including allowing serious crimes to go unpunished, and causing the objective of the Act to expedite the administration of criminal justice to be undermined. A case tried to a satisfactory conclusion a few days later than the Act specifies, without substantial adverse effect on anyone, can require costly retrial a year or more later, after appeal, dismissal of the indictment, and reindictment, in a manner causing vast expense, inefficiency, unfairness, and unjustifiable delay in the administration of criminal justice. We see no reason to believe Congress intended such illogical results.

Absent a clear indication to the contrary, we believe the Speedy Trial Act should be interpreted, like other laws, to operate consistently with the overriding prescription of 28 U.S.C. § 2111 that courts should disregard defects that do not affect substantial rights.

Needless to say, the availability of harmless error analysis does not trivialize the Act's concerns. Furthermore, as we cautioned in *Gambino*, "our holding is not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds . . . will routinely follow. On the contrary, since we review the question of prejudice *de novo*, nondismissal in the event of a violation will always risk nullifying an entire trial." *Gambino*, 59 F.3d at 363.

The question we face is whether Zedner is entitled to have his conviction vacated and the indictment dismissed by reason of the court's failure to start trial during a period when trial could not have been conducted – because Zedner was not competent to stand trial and Zedner's counsel was not available. Zedner has failed to put forth

any convincing argument that this delay prejudiced him at his trial.[6] We conclude without hesitation that the error, if any, was harmless and that Zedner is not entitled to Speedy Trial Act relief on that account.

II. Speedy Trial Clause

In addition to his claims under the Speedy Trial Act, Zedner also argues that his rights under the Speedy Trial Clause of the Sixth Amendment have been violated by the seven-year delay between indictment and trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court identified four factors relevant to determining whether the Speedy Trial Clause of the Sixth Amendment has been violated: (1) length of the delay; (2) the reason for the delay; (3) whether and how the defendant asserted the speedy trial right; and, (4) prejudice to the defendant. *Id.* at 530. The Court cautioned that "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* at 533. We conclude that there was no violation of the Speedy Trial Clause of the Sixth Amendment.

It is true that the first factor, length of the delay, favors Zedner, *see United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979) (54-month

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[6] Zedner complains that he was prejudiced when the government impeached the psychologist who testified as the only witness on Zedner's behalf on the ground he had not examined Zedner until years after Zedner committed his crime. The problem with this argument is that the psychiatrist examined Zedner on May 5, 2000, three months *before* the period of delay of which Zedner complains, and therefore any prejudice cannot be attributed to the district court's failure to rule expeditiously in August 2000.

delay "is unquestionably substantial"), but the second factor, the reasons for the delay, weighs heavily against him. Most of the delay between indictment and trial was caused by Zedner's own requests for delay, his attempts to subpoena prominent persons and fictitious entities, the need to determine his competency to stand trial, Zedner's incompetency for a time, and two interlocutory appeals taken by him. *See United States v. Vasquez*, 918 F.2d 329, 338 (2d Cir. 1990) (citing defendant's various pretrial motions as reason weighing against defendant); *see also United States v. Mills*, 434 F.2d 266, 271 (8th Cir. 1970) (holding "that delays encountered in bringing a defendant to trial who claims to be incompetent or who is temporarily incompetent ordinarily do not infringe upon his Sixth Amendment right to a speedy trial," and citing, *inter alia*, *United States v. Davis*, 365 F.2d 251 (5th Cir. 1966); *Johnson v. United States*, 333 F.2d 371, 374 (10th Cir. 1964)).

The third factor, whether and how the defendant asserted the speedy trial right, also weighs against Zedner. For several years, Zedner repeatedly requested continuances. His request to be tried "as soon as possible" did not come until August 2000, nearly four-and-a-half years after his indictment. *See United States v. Jones*, 91 F.3d 5, 8-9 (2d Cir. 1996) (failure to assert right for four months after indictment weighs against defendant).

The fourth and final factor, prejudice to the defendant, also weighs against Zedner. Prejudice "should be assessed in the light of the interests . . . the speedy trial right was designed to protect. . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. Of these interests, "the most

serious is the last." *Id.* Zedner was not incarcerated prior to trial and his bail conditions were not particularly onerous. He undoubtedly experienced anxiety, but the record contains no indication that the anxiety was acute. There is no indication that Zedner's ability to mount an effective defense was seriously impaired. Indeed, much of the pretrial delay resulted from the wide latitude the district court granted Zedner to prepare his defense.

Balancing the four factors identified in *Barker*, we conclude that Zedner's Sixth Amendment right to a speedy trial was not violated. The gap between indictment and trial was long, but the major part of the delay resulted from his requests for delay and serious problems concerning his competency to be tried.

III. Rule 404(b) Evidence

Zedner claims the district court abused its discretion by admitting testimony of two rebuttal witnesses to the effect that Zedner committed frauds in 1988. The first witness testified that, when she sought Zedner's help to refinance her mortgage, he transferred the deed to her home into his own name. She had to file a lawsuit to regain title. The second witness also approached Zedner for help refinancing her mortgage. She consented to a dummy sale of her house to Zedner with the understanding that he would refinance the house in his own name to overcome her bad credit rating and then return the house to her. When Zedner asserted full ownership, the witness sued to recover title.

Federal Rule of Evidence 404(b) provides that prior act evidence "is not admissible to prove the character of a person in order to show action in conformity therewith,"

but "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" This court considers four factors to determine whether evidence was properly admitted under Rule 404(b): "whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004) (per curiam). This evidence of fraud was offered for a proper purpose and was relevant. Zedner based his defense on the claim that he was delusional and lacked criminal intent because he did not know the bonds were counterfeit. Testimony about his other fraudulent acts tended to prove Zedner's financial sophistication, his ability to execute complex schemes, and his ability to form intent to defraud. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). Although admission of other bad act evidence runs the risk that the jury will punish the defendant for the other actions rather than the charged offense, the probative value of the evidence outweighed any prejudice. Moreover, the district court reduced any risk of unfair prejudice with a carefully worded limiting instruction. Accordingly, we conclude that the district court did not err, much less abuse its discretion, when it admitted this evidence of fraud.

IV. Conscious Avoidance

Zedner contends that the district court erroneously instructed the jury on conscious avoidance. He challenges both the decision to give the instruction and the content of

the instruction. We conclude that an appropriate factual basis existed to give the conscious avoidance charge. Although the precise charge given was not ideal, no objection was made to its specific terms and its deficiencies were not so dire as to constitute plain error.

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt 'that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)). Zedner concedes that the first prong has been met because he denied knowing that the bonds were counterfeit. He contends, however, that the second prong was not met because there was an insufficient factual basis for the jury to conclude that he deliberately chose not to inquire into whether the bonds were genuine.

Zedner relies on two main arguments. First, he points out that, contrary to what one would expect of a person avoiding the truth, he repeatedly took the bonds to different financial institutions in an attempt to determine their authenticity. The argument mischaracterizes the evidence. Zedner took the bonds to financial institutions attempting to use them in a fraudulent transaction. He insisted on the bonds' authenticity and told elaborate lies to cover for the bonds' obvious facial defects. Nor did he disclose his prior unsuccessful attempts to deposit the bonds with other institutions. We cannot say on this record it would have been irrational for a jury to conclude that Zedner avoided the truth about the bonds.

Second, Zedner argues that there was no adequate factual basis for giving a conscious avoidance charge because the jury could have concluded either that (1) Zedner was not delusional at all and therefore had actual knowledge that the bonds were counterfeit, or that (2) Zedner was delusional and did not make a conscious decision to overlook the suspect nature of the bonds because he genuinely believed they were real. He is correct that jurors could have found he actually knew the bonds were counterfeit, in which case they should have convicted, or that he genuinely believed they were genuine, in which case they should have acquitted him. But the jury could also have reasonably concluded that Zedner was aware of the high probability that the bonds were counterfeit and deliberately avoided confirmation of that fact. A conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge." *Hopkins*, 53 F.3d at 542; *see also United States v. Wong*, 884 F.2d 1537, 1542 (2d Cir. 1989). We conclude that the district court made no error in its decision to instruct the jury on conscious avoidance.

We now turn to the specific language of its instruction. After the district court initially overruled Zedner's objection to giving the conscious avoid charge, the defense proposed changes to the wording of the charge. The district court accepted these changes. The defense renewed its objection to giving the charge after the jury retired, but never raised any specific objections to the content of the modified charge. Accordingly, we review the language used by the district court for plain error. *See United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988) (per curiam); *United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986).

In the course of its instruction, the district court said, "knowledge that Government's Exhibit 1 was a fictitious instrument may he inferred [from] circumstances that convince an average or other person that . . . this is the fact." Trial Tr. at 417. Zedner argues that allowing the jury to infer knowledge from circumstances that would convince "an average or other person" that the bonds were false invited the jury to convict based on negligence. *See Rodriguez*, 983 F.2d at 458 (suggesting that conscious avoidance cannot be found merely because the circumstances "'should have apprised [the defendant] of the unlawful nature of [his] conduct'" (quoting *United States v. Joyce*, 542 F.2d 158, 161 (2d Cir. 1976)). If this language stood alone, Zedner would have a strong point. However, we review a potentially erroneous instruction in "light of the jury charge as a whole." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2d Cir. 1989); *see also Jones v. United States*, 527 U.S. 373, 391 (1999) (citing cases). The problematic instruction quoted above was given in conjunction with other passages, which told the jury, "If the defendant did not knowingly . . . make material misrepresentations you must find the defendant not guilty," and that it could not convict even if the "reason that the defendant lack[ed] such knowledge . . . was careless[ness] and negligen[ce] or even foolish[ness]." Trial Tr. at 417. In addition, the court said that conscious avoidance could not satisfy the knowledge requirement, regardless of what an average person would believe in the situation, if "the facts showed that the defendant actually believed that the instrument was authentic." *Id.* Reviewing the charge as a whole, we conclude that the risk of misunderstanding was substantially diminished. We therefore cannot say any error was "so obvious and seriously prejudicial to [Zedner's] substantial rights" as to

warrant relief where Zedner made no objection to the content of the charge. *United States v. Bonito*, 57 F.3d 167, 174 (2d Cir. 1995).

IV. Downward Departures

Zedner alleges that the district court mistakenly believed it lacked the authority to grant a downward departure on the basis of diminished mental capacity or his contention that the loss determination overstated the seriousness of the offense. The government responds that the district court understood its authority to depart but chose not to exercise that authority as a matter of discretion. The decision whether to depart is committed to the sentencing court's discretion, but we remand for resentencing when we perceive a "substantial risk that the judge misapprehended the scope of his departure authority." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (internal quotation marks omitted).

The district court's comments at sentencing, although ambiguous, appear on occasion to conflate the standard for diminished mental capacity with the standard for failure to form criminal intent. As a result, the district court seemed to conclude that it could not grant a downward departure for diminished mental capacity in light of the jury verdict finding beyond a reasonable doubt that Zedner intended to defraud the various financial institutions he approached with his counterfeit bonds.

A downward departure for diminished mental capacity "may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."

U.S.S.G. § 5K2.13. A finding of diminished mental capacity does not necessarily mean that a defendant lacked criminal intent. *See United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (per curiam) ("[The district court's] statement suggests that it thought of diminished capacity as a question of *mens rea* for the jury to decide at trial . . . rather than a question for the court at sentencing. But that is incorrect."). For example, a defendant might fully intend to defraud a business partner, but if the fraud itself was motivated by baseless delusions that the defendant needed the money to ransom a fictitious kidnap victim, a sentencing court might properly find that the defendant was less culpable and grant a downward departure. If a jury verdict convicting the defendant, and thereby indicating that the defendant formed the requisite criminal intent, precluded such a departure, it would make little sense for § 5K2.13 to appear in the Guidelines, because by the time a judge considers a downward departure for diminished mental capacity, every defendant has necessarily been found, either based on his plea or trial evidence, to have acted with criminal intent. Indeed, an application note added to the Guidelines in 1998 stated, "'Significantly reduced mental capacity' means the defendant, *although convicted*, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." U.S.S.G. App. C, amend. 583 (codified at U.S.S.G. § 5K2.13, cmt. n.1) (emphasis added). Although this amendment was added after the 1995 version of the Guidelines used in this case, it merely made explicit what was already implicit in the structure of the Guidelines – a conviction does not preclude a downward departure for diminished mental capacity.

In rejecting counsel's argument for departure based on diminished mental capacity, the court said,

> You argued, I thought very successfully, to the jury, that he was suffering, if I can use that word, from a delusional complex. I think the jury might have bought it up until the last two witnesses of the people who he attempted to defraud by his machinations, and [at that] point, whatever delusional defense you had went out the window, and I'm not going to interfere with that determination by the jurors.

We cannot discern exactly what the court meant by this statement. It seems to suggest that the court believed the jury's rejection of the defendant's contention that he acted without intent to defraud precluded the court from finding diminished mental capacity that would justify a departure. If so, that was incorrect. The defendant could have acted with criminal intent so as to be guilty of the crime, while at the same time suffering from a diminished mental capacity that would justify departure. Such a departure would in no way "interfere with" the jury's finding of guilt.

In two other respects the court may have misunderstood its sentencing discretion. Zedner's counsel argued that the loss calculation under U.S.S.G. § 2F1.1(b)(1) overstated the seriousness of his offense because the bonds were so obviously invalid that they were unlikely to fool any financial institution. The court responded that it "never saw anything in the sentencing guidelines" to support that contention. In fact, Comment 10 to the pertinent guideline expressly authorizes the argument Ms. Gaffey was making. It states, "In a few instances, the loss determined under subsection (b)(1) may overstate the

seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted." U.S.S.G. § 2F1.1, cmt. n.10 (1995).

The court also rebuffed Ms. Gaffey's argument based on the obviously phony nature of the bonds by saying, "You argued that to the jury. They didn't buy it." That remark seems to indicate that the court believed it could not depart downward based on the obviously phony nature of the bonds because the jury had rejected Zedner's argument that he lacked a criminal state of mind on account of his delusional belief that the bonds were genuine. There is no incompatibility between a jury's finding that the defendant did not delusionally believe phony bonds were genuine and a court's conclusion that the severity of the offense was diminished by the obviously spurious nature of the bonds. *Cf. United States v. Agwu*, 5 F.3d 614, 616 (2d Cir. 1993) (per curiam) (noting that a decision not to depart pursuant to Comment 10 "is not appealable unless the refusal was based on the court's mistaken belief that it did not have the discretion to do so").

The combination of circumstances resulting from the risk that the court misconstrued its authority to depart downward and the upheaval in the federal sentencing laws resulting from the Supreme Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), convinces us that the best course is to remand for resentencing consistent with this opinion and in accordance with the dictates of *Booker*.

CONCLUSION

We have considered Zedner's remaining claims and find them to be without merit. For the foregoing reasons, we AFFIRM the judgment of conviction, but VACATE the sentence and REMAND for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24 day of May two thousand five.

United States of America,

Appellee,

v. Docket # 04-0821

Jacob Zedner,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jacob Zedner. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

No. 05-5992

FILED
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OFFICE OF THE
SUPREME COURT

In The

Supreme Court of the United States

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

EDWARD S. ZAS
Counsel of Record

BARRY D. LEIWANT
SEAN HECKER
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Speedy Trial Act of 1974, as amended in 1979 and 1984, 18 U.S.C. §§ 3161-3174 (West 2005), requires the Government to bring a criminal defendant who pleads not guilty to trial within 70 days, excluding certain specified periods. 18 U.S.C. § 3161(c)(1) & (h). If this time limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be either "with or without prejudice." *Ibid.* The Act specifies only one way in which a defendant may waive this right to dismissal, *i.e.*, by not moving to dismiss before trial. *Ibid.*

This case presents two questions that divide the courts of appeals:

1. Whether, in light of the statute's text and Congress's goal of protecting the public interest in prompt criminal trials, the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, the issue left open in *New York v. Hill*, 528 U.S. 110, 117 n.2 (2000).

2. Whether a violation of the Speedy Trial Act's 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis, despite the statute's mandatory language stating that, in the event of a violation, the "indictment shall be dismissed."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	1
Introduction	1
The Speedy Trial Act: An overview	3
The speedy trial waiver "for all time"	5
The 1997 delay: January 31, 1997 to May 2, 1997	6
The delay from 1997 to 2000	8
The delay from 2000 to 2001	8
The motion to dismiss the indictment	10
The trial and sentence	10
The decision of the court of appeals	12
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. A defendant may waive the requirements of the Speedy Trial Act only as the statute specifically permits	18

TABLE OF CONTENTS – Continued

Page

A. Waiver of a statutory right is not permitted where waiver would contravene the statute's text, structure and purpose 18

B. Permitting waiver of the Speedy Trial Act's 70-day time limit is inconsistent with the Act 19

C. The purported waivers relied upon by the courts below were ineffective to toll the Act's 70-day time limit 29

II. A violation of the Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis 33

A. Harmless-error analysis does not apply where a statutory timing provision mandates the sanction of dismissal for a violation 34

B. Harmless-error analysis is inconsistent with the remedial framework of the Act 38

C. The history and purpose of the dismissal provision do not support the application of harmless-error analysis 40

D. The decision of the court of appeals should be vacated 42

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Bozeman, 533 U.S. 146 (2001) ..... *passim*

Anderson v. Yungkau, 329 U.S. 482 (1947) 36

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 25

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 19

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) 18, 19

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 16

Crosby v. United States, 506 U.S. 255 (1993) 18

Dodd v. United States, 125 S. Ct. 2478 (2005) 30

Escoe v. Zerbst, 295 U.S. 490 (1935) 36

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 30, 31

Henderson v. United States, 476 U.S. 321 (1986) 9

Lamie v. United States Trustee, 540 U.S. 526 (2004) 42

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 37

New York v. Hill, 528 U.S. 110 (2000) 18, 28, 29

Richards v. United States, 369 U.S. 1 (1962) 43

Russello v. United States, 464 U.S. 16 (1983) 25

Smith v. United States, 360 U.S. 1 (1959) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Berberian, 851 F.2d 236 (9th Cir. 1988) 6

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994) 14, 31

United States v. Brenna, 878 F.2d 117 (3d Cir. 1989) (per curiam) 35

United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981) 6, 26, 27

United States v. Doran, 882 F.2d 1511 (10th Cir. 1989) 35

United States v. Dunbar, 357 F.3d 582 (6th Cir. 2004), *vacated*, 543 U.S. 1099 (2005) 35

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995) 6

United States v. Garrett, 720 F.2d 705 (D.C. Cir. 1983) 35

United States v. Hastings, 847 F.2d 920 (1st Cir. 1988) 35

United States v. Janik, 723 F.2d 537 (7th Cir. 1983) 41

United States v. Johnson, 29 F.3d 940 (5th Cir. 1994) 35

United States v. Jones, 887 F.2d 492 (4th Cir. 1989) 35

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 6

United States v. Koory, 20 F.3d 844 (8th Cir. 1994) 35

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 6, 31

United States v. Lewis, 349 F.3d 1116 (9th Cir. 2003) (per curiam) 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997) 26

United States v. Mezzanatto, 513 U.S. 196 (1995) 15, 18, 24, 29

United States v. Montalvo-Murillo, 495 U.S. 711 (1990) 36

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 6, 31, 41

United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) 24

United States v. Ray, 768 F.2d 991 (8th Cir. 1985) 6

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993) 6, 26, 28

United States v. Smith, 415 F.3d 682 (7th Cir. 2005), *petition for cert. filed*, [U.S. Oct. 15, 2005] (No. 05-7009) 35

United States v. Stafford, 697 F.2d 1368 (11th Cir. 1983) 35

United States v. Taylor, 487 U.S. 326 (1988) ..... *passim*

United States v. Willis, 958 F.2d 60 (5th Cir. 1992) ..... *passim*

United States v. Zedner, 193 F.3d 562 (2d Cir. 1999) (per curiam) 8

United States v. Zedner, 29 Fed. Appx. 711 (2d Cir. 2002) 10

United States v. Zedner, 401 F.3d 36 (2nd Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006) 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. amend. VI 10, 26

18 U.S.C. § 3161-3174 1

18 U.S.C. § 3161(b) 4

18 U.S.C. § 3161(c)(1) ..... *passim*

18 U.S.C. § 3161(c)(2) 24, 36

18 U.S.C. § 3161(h) 2, 14, 22

18 U.S.C. § 3161(h)(1)(J) 3, 9

18 U.S.C. § 3161(h)(1)-(7) 3

18 U.S.C. § 3161(h)(8) 23

18 U.S.C. § 3161(h)(8)(A) ..... *passim*

18 U.S.C. § 3161(h)(8)(B)(ii) 10

18 U.S.C. § 3161(h)(8)(B)(iv) 4

18 U.S.C. § 3161(h)(8)(C) 4

18 U.S.C. § 3161(h)(9) 27

18 U.S.C. § 3162(a)(1) 4

18 U.S.C. § 3162(a)(2) ..... *passim*

18 U.S.C. § 3162(b) 32

18 U.S.C. § 3164(a) 3

18 U.S.C. § 3164(b) 3

18 U.S.C. § 3164(c) 22

18 U.S.C. § 3288 41

18 U.S.C. § 5036 22

18 U.S.C. App. 2 § 2 ..... 17, 35

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. App. 2 § 2, Article IV(e) 36

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2111 ..... 1, 17, 37

Fed. R. Crim. P. 52(a) 1, 17, 37

LEGISLATIVE MATERIALS

120 Cong. Rec. 41618 (1974) 21

H.R. 7107, 92d Cong., 1st Sess. (1971) 42

H.R. Rep. No. 93-1508 (1974) 20, 22

Pub. L. No. 93-619, 93rd Cong., 88 Stat. 2076 (Jan. 3, 1975) 20

Pub. L. No. 100-690, § 7081(a), 102 Stat. 4407 41

S. 895, 92d Cong., 1st Sess. (1971) 22, 42

S. Rep. No. 93-1021 (1974) 19, 20, 22, 23

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TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals is reported at 401 F.3d 36. J.A. 189-220. The opinion of the district court denying petitioner's motion to dismiss the indictment under the Speedy Trial Act is unpublished. J.A. 128-44. The judgment of conviction appears at J.A. 179-88.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. The order of the court of appeals denying petitioner's request for rehearing and rehearing *en banc* was entered on May 24, 2005. J.A. 221-22. The petition for certiorari was filed on August 22, 2005, and granted on January 6, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves the Speedy Trial Act of 1974, as amended in 1979 and 1984, 18 U.S.C. §§ 3161-3174 (West 2005) ["Speedy Trial Act" or "the Act"], 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). These statutes and Rule 52(a) are reproduced in the Appendix annexed to this brief.

STATEMENT OF THE CASE

Introduction

Jacob Zedner did not receive a speedy trial. A decade ago, on March 12, 1996, the United States Secret Service

arrested him after he presented a phony $10 million "U.S. Dollar Bond" to six financial institutions. J.A. 191. The institutions rejected the document because of obvious indicia that it was not real, such as gross misspellings (*e.g.*, "Onited States," "Thunted States," "Cgicago") and references to the non-existent "Ministry of Finance of U.S.A." J.A. 191 & n.1. Mr. Zedner explained the misspellings as a "secret code" that proved the bond's authenticity, but the banks were not persuaded. J.A. 140, 191; Trial Tr. 121.

Following petitioner's release on bail, a Grand Jury in the Eastern District of New York indicted him for bank fraud on April 4, 1996. J.A. 66-69, 191. Absent excludable delay, the Speedy Trial Act required that his trial commence within 70 days of the indictment, *i.e.*, by June 13, 1996. *See* 18 U.S.C. § 3161(c)(1) & (h). Mr. Zedner was not tried until April 7, 2003 (J.A. 196), more than seven years after his indictment and more than two years after he requested a trial "as soon as possible." J.A. 90, 194.

This case concerns two periods of delay that were not excluded on any basis under the Speedy Trial Act. The first period is a 90-day delay from January 31, 1997 to May 2, 1997. This delay occurred when the district court granted the defense an adjournment but did not find, as required by the Act, that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). The second period of delay concerns 195 days that passed from August 23, 2000 to March 6, 2001. During this time, the district court held a competency proceeding under advisement, despite the command of the Act that only 30 days are excludable for the time a "proceeding concerning the

defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J).

The district court found no speedy trial violation. It relied on a purported waiver of speedy trial rights "for all time" that petitioner and his counsel had executed at the court's urging in November 1996. The court of appeals affirmed, but on other grounds. The court did not find that the prospective waiver "for all time" was valid. The court held, however, that the 90-day delay in 1997 had been implicitly waived by counsel, and that the subsequent 195-day delay was harmless error. J.A. 203-04, 206-09.

The Speedy Trial Act: An overview

The Speedy Trial Act mandates, *inter alia*, that a criminal trial "shall commence" within 70 days of the indictment or the defendant's first appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1).[1] The Act automatically excludes various categories of delay from the 70-day limit. 18 U.S.C. § 3161(h)(1)-(7). It also contains an "ends of justice" provision that excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best

[1] A 90-day time limit applies to a person "who is being held in detention solely because he is awaiting trial" or to "a released person who is awaiting trial and has been designated * * * as being of high risk." 18 U.S.C. § 3164(a), (b).

> interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). This provision further states:

> No such period of delay * * * shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Ibid. In deciding whether to grant an "ends of justice" continuance, the court "shall consider" enumerated statutory factors, such as the complexity of the case and the need for effective trial preparation, "taking into account the exercise of due diligence." 18 U.S.C. § 3161(h)(8)(B)(iv). A continuance may not be granted because of "general congestion of the court's calendar." 18 U.S.C. § 3161(h)(8)(C).

If the 70-day limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be "with or without prejudice" to reprosecution depending on the "seriousness of the offense[,]" the "facts and circumstances of the case which led to the dismissal[,]" the prejudice, if any, to the defendant, and the "impact of a reprosecution on the administration of [the Act] and on the administration of justice." *Ibid.*; *United States v. Taylor*, 487 U.S. 326, 342 (1988).[2] The Act provides only one way for a defendant to waive his

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[2] A similar scheme applies to the provisions of the Act that require that an indictment be returned within 30 days of the defendant's arrest. 18 U.S.C. § 3161(b), 3162(a)(1).

right to dismissal: by not moving to dismiss before trial. 18 U.S.C. § 3162(a)(2).

The speedy trial waiver "for all time"

The court granted Zedner adjournments from April through November 1996. Upon each adjournment, the court entered an order of "excludable delay." J.A. 191-92.

On November 8, 1996, defense counsel sought another delay through the end of January 1997. The court said, "if I'm going to give you that long an adjournment, I will have to take a waiver for all time." J.A. 71. The court explained that it had "some big cases" pending and "if I get bogged down with them [it] may be a long while before you get a trial." J.A. 71. The court added, "I have to take what I call a complete waiver where he can't come in * * * and say I only waive for so long as it is convenient for me to waive." J.A. 71. Defense counsel responded, "We've [sic] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72.

The court presented Zedner with a form that recited, *inter alia*, "I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time." J.A. 79. The court took the position that such a waiver was enforceable and stated that "nobody has yet challenged [this position] who has read the Speedy Trial Act." J.A. 73. In fact, every court of appeals to have considered the issue, including the Second Circuit, had already held that speedy trial waivers were invalid because they

undermined the public interest in swift justice that the Act protects.[3]

The court also announced that the waiver was irrevocable. It explained, "[O]nce you say, Judge, I'm not going to and I will not make a motion to dismiss the case against me for failure to give me a speedy trial, you cannot get it back. You've waived it and it's gone." J.A. 73.

Petitioner and his counsel executed the waiver on November 8, 1996. The court also entered an order excluding the delay through January 31, 1997. J.A. 192.

The 1997 delay: January 31, 1997 to May 2, 1997

At the January 31 conference, the Government stated it "would like to try the case sometime in 1997." J.A. 81. The prosecutor noted that "the defendant has waived for all time but I would like to try it before then." J.A. 81.

Although the case had been pending for more than nine months, defense counsel wanted more delay, noting that Zedner would waive his speedy trial rights again. J.A. 81. The court responded, "You don't have to do it twice because once you've waived you can't get it back." J.A. 81.

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[3] *See United States v. Gambino*, 59 F.3d 353, 359-60 (2d Cir. 1995) ("We join with every circuit that has addressed the issue in finding that defendants generally may not elect to waive the protections of the Act.") (citing *United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994); *United States v. Saltzman*, 984 F.2d 1087, 1091 (10th Cir. 1993); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992); *United States v. Kucik*, 909 F.2d 206, 210-11 (7th Cir. 1990); *United States v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988); *United States v. Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985), *United States v. Pringle*, 751 F.2d 419, 434-35 (1st Cir. 1984); *United States v. Carrasquillo*, 667 F.2d 382, 389 (3d Cir. 1981)).

Defense counsel said he was "trying to tap on the proper channels to authenticate" the "Onited States" bond. J.A. 81-82. Counsel sought "one more adjournment to May 2nd" and a trial date at the "end of the year." J.A. 82.

The court responded, "The end of the year?" J.A. 82. The court found it "very difficult to believe anybody in the Treasury Department will authenticate these bonds and I'm trying to grasp what might be out there." J.A. 84. Counsel said he had consulted a "bond expert" and wanted the opportunity to "digest what my client and others have relayed to me." J.A. 84-85.

The court said, "Well, I don't think I can give you that much time." J.A. 85. The court set a deadline of "April 1st for trial. I may not reach you but I may reach you shortly thereafter. This [case] is a year old. That's enough for a criminal case." J.A. 85.

Defense counsel insisted that he needed until May and reiterated that Zedner "has waived the speedy trial time." J.A. 85. The court responded, "We can't carry a case * * * in this kind of posture forever." J.A. 85. The court set the case "tentatively" for trial on May 5, 1997, "assuming I can free myself up." J.A. 86.[4]

The court entered no order excluding the period from January 31, 1997 to May 5, 1997, from the 70-day clock. The court made no finding that the ends of justice served by this adjournment outweighed the interests of the public in a speedy trial. 18 U.S.C. § 3161(h)(8)(A). And the court

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[4] The next court appearance was on May 2, 1997, rather than May 5, 1997. Accordingly, the period of delay at issue is January 31 to May 2, 1997. *See* J.A. 197.

gave no reason that would have supported such a finding, had it been made. J.A. 192.

The delay from 1997 to 2000

Defense counsel moved to be relieved on May 2, 1997, stating that he could not present the defense Mr. Zedner wanted, namely, that the bond was real. J.A. 192. The court discharged the lawyer. After having Zedner evaluated by a psychiatrist, who found him competent, the court allowed Zedner to represent himself effective September 8, 1997. J.A. 193. Zedner spent the next year serving subpoenas on high-level Government officials. J.A. 193. Then, in October 1998, with Zedner prepared to try the case himself, the court held a competency hearing, found him incompetent, and stayed the commitment order pending appeal. J.A. 193-94. The court of appeals assigned the Federal Defender to represent Zedner, and vacated the incompetency finding because the district court had permitted him to appear *pro se* at the competency hearing. *See United States v. Zedner*, 193 F.3d 562 (2d Cir. 1999) (per curiam); J.A. 194.

The delay from 2000 to 2001

On July 10, 2000, a second competency hearing was held at which the Federal Defender represented Zedner. J.A. 194. The sole witness was a defense psychologist who testified that Zedner was delusional, but competent to be tried if he could cooperate with counsel in the presentation of a lack-of-fraudulent intent defense. J.A. 91-92.

Defense counsel argued that petitioner was competent and requested a trial "as soon as possible," J.A. 90, offering to waive a jury and proceed to a bench trial "immediately." J.A. 98. Counsel noted that, upon a finding of competency, "the trial of this four-year old case can proceed expeditiously." J.A. 98. If, however, Zedner were found incompetent and imprisoned, it would only cause "further delay." J.A. 98.

The Government argued that Zedner could not be tried because his delusions rendered him incompetent. J.A. 100-10. The prosecutor cited Zedner's belief that he was "'the head of a group of people who were managing all of the money in the Federal Reserve'" and that he had been "'entrusted with hundreds of billions of dollars to manage.'" J.A. 103 (quoting defense expert).

The competency proceeding was taken "under advisement" on August 23, 2000, when the final post-hearing memorandum was filed. J.A. 194-95. The court had 30 days to render a decision before the 70-day clock would resume ticking. J.A. 204 n.4.[5]

For reasons the district court never explained, the case then sat idle for the next 195 days, from August 23, 2000 to March 6, 2001.

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[5] *See* 18 U.S.C. § 3161(h)(1)(J) (excluding "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."), *Henderson v. United States*, 476 U.S. 321, 328-29 (1986) (Act "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' *i.e.*, 30 days from the time the court receives all the papers it reasonably expects * * * * *").

The motion to dismiss the indictment

By March 2001, Zedner had been living under indictment, with bail restrictions, for half a decade. His competency had been *sub judice* since August 2000. Accordingly, on March 7, 2001, Zedner moved to dismiss the indictment pursuant to the Speedy Trial Act and the Sixth Amendment. J.A. 111-27, 195.

On March 21, 2001, the court denied the motion. J.A. 128-36, 195. The court found this single-defendant case "complex"[6] and ruled enforceable the 1996 waiver in perpetuity. J.A. 128-29, 195.[7] The court went on to find Zedner incompetent. J.A. 135-36. This finding was affirmed, *see United States v. Zedner*, 29 Fed. Appx. 711 (2d Cir. 2002), and Zedner was committed to prison for treatment in May 2002. J.A. 196.

The trial and sentence

Government doctors found Mr. Zedner delusional, but competent to proceed, and he was released in August 2002. J.A. 196. His trial finally began on April 7, 2003. J.A. 196.[8]

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[6] The complexity of a case is a factor a court must consider in deciding whether to grant an "ends of justice" continuance *See* 18 U S C. § 3161(h)(8)(B)(ii). However, complexity does not automatically extend the Act's time limits *See* 18 U S C § 3161(h)(8)(A).

[7] The court also held that Zedner had waived his right to dismissal by not moving to dismiss before his trial was scheduled to but did not commence in October 1998. J.A 129 The Act, however, only required him to move for dismissal "prior to trial." 18 U.S.C. § 3162(a)(2). Neither the Government nor the court of appeals relied on this alternative waiver rationale.

[8] The record does not explain the reasons for this final eight-month delay, but petitioner did not challenge it below and does not rely upon it here.

Before trial, the Government announced it would move to dismiss the indictment without prejudice and seek to re-indict Zedner to avoid a speedy trial problem on appeal. J.A. 168-69. The Government then reversed course and proceeded to trial on the original indictment. J.A. 175-78. The prosecutor explained to the court, "I think we will be okay in the Court of Appeals based on your Honor's waiver for all time." J.A. 176.

Defense counsel argued to the jury that Zedner lacked the intent to defraud because his delusions had caused him to believe that his phony bond was genuine. J.A. 196. The prosecutor had successfully opposed trying the case in August 2000, over defense objections to further delay, by citing Zedner's delusions, persuading both the district court and the court of appeals that Zedner was not mentally competent. *See, e.g.*, J.A. 100-10, 129-36. At trial, however, when defense counsel cited these delusions to show Zedner's lack of fraudulent intent, the same prosecutor switched positions and argued, contrary to all the medical evidence (including the report of the Government's own doctors, *see* Trial Tr. at 284-85), that Zedner was faking his delusions. *See id.* at 361-64, 400-01.[9]

Mr. Zedner was convicted and sentenced to 63 months in prison, where he remains. J.A. 197. Because he presented his $10 million bond to six banks, the court found

[9] Zedner argued on appeal that this shift in position was plain error that likely resulted in the conviction of a person who, by reason of mental illness, was innocent. The court of appeals did not discuss this issue in its opinion.

him responsible for an intended loss of $60 million under the Sentencing Guidelines. J.A. 197.[10]

The decision of the court of appeals

On appeal, petitioner argued that the indictment had to be dismissed based on two periods of delay that each exceeded the Speedy Trial Act's 70-day limit: (1) the three-month adjournment that the court afforded defense counsel from January 31, 1997 to May 2, 1997, without making an "ends of justice" exclusion; and (2) the unexplained delay while the competency motion was kept under advisement between August 2000 and March 2001. J.A. 197-98. The court of appeals denied relief as to both periods, but did not rely on the waiver "for all time." The court reasoned, "Th[e] public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." J.A. 200.

Nevertheless, the court held that Zedner had implicitly waived his right to dismissal based on the 1997 delay because his lawyer had requested this delay to investigate whether the misspelled bond was genuine. J.A. 203-04. No relief was warranted, the court of appeals opined, because this delay was "reasonable" and "could have" been – but admittedly was not (*see* J.A. 192) – excluded from the

[10] The court of appeals remanded for resentencing because the district court apparently misunderstood its authority to depart from the then-mandatory Guideline range based on Zedner's diminished capacity and his argument that the $60 million loss amount overstated the seriousness of the crime. J.A. 216-20. On remand, the district court declined to resentence. The appeal from that decision is currently pending before the Second Circuit.

Speedy Trial Act clock in accordance with the "ends of justice" procedures set forth in 18 U.S.C. § 3161(h)(8)(A). J.A. 203.

The court rejected the Fifth Circuit's rule that a delay granted at the request of the defense is not excludable in the absence of a proper "ends of justice" finding. J.A. 201-02 (discussing *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992)). The court decided that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." J.A. 203.

The court of appeals also denied relief based on the 2000-2001 delay. The court held that any violation of the 70-day limit based on this period of inactivity was "harmless error." J.A. 205-09. The Act requires that the "indictment shall be dismissed" upon request, either with or without prejudice to further prosecution, whenever the 70-day limit is violated. 18 U.S.C. § 3162(a)(2). Nevertheless, the court held that "harmless error analysis is appropriate in Speedy Trial Act cases" because "[t]here are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful." J.A. 207.

The court held that petitioner had not shown that this 195-day delay "prejudiced him at his trial." J.A. 209. The court added that, because petitioner was found incompetent after this delay, he could not have been tried during this period. J.A. 204-05. This rationale, however, does not justify the district court's failure to resolve the competency issue promptly. If the court had decided the issue

expeditiously, petitioner would have been treated for his incompetency and tried many months sooner.[11]

SUMMARY OF ARGUMENT

The Speedy Trial Act sets forth a comprehensive framework to ensure the prompt disposition of federal prosecutions. The Act is "plain-speaking." *United States v. Blackwell*, 12 F.3d 44, 46 (5th Cir. 1994). It provides that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days* * * *" 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within this time frame (plus any excludable time under Section 3161(h)), the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). The Act further specifies that any delay resulting from a continuance granted at the request of the defendant, his counsel, or the prosecutor counts towards the 70-day limit unless the judge "granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

I. In this case, the district court and the Government abdicated their statutory responsibility to ensure that all defendants are tried promptly, even if they would prefer to postpone the day of judgment. The district court effectively

[11] The court of appeals also noted that defense counsel had a difficult pregnancy as of late November 2000 and was on parental leave some time later J.A. 195, 204-09. The district court never cited this as a basis for the delay and there is no evidence the court was aware of the pregnancy at the time. J.A. 195 n.2.

nullified the Speedy Trial Act by securing and enforcing an invalid speedy trial waiver "for all time." As every court of appeals to address the issue had held, *see* p. 6 n.3, *supra*, and as the Government acknowledged to this Court in 1994,[12] such waivers are ineffective. The text, structure and history of the Act make clear that the statute does not bestow upon a defendant a personal right that is his or hers alone to waive. Rather, the Act protects an important public interest in the prompt administration of justice that transcends – and is often adverse to – the interests of individual litigants. Allowing waivers would therefore frustrate the Act's central purpose of protecting society's interest in swift justice whether or not prosecutors or defendants perceive speed to be in their interest. *See United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992) ("The Act's central intent to protect society's interests requires that a defendant's purported waiver of his rights under the Act be ineffective to stop the speedy trial clock from running.").

The court of appeals was therefore correct not to enforce petitioner's purported waiver "for all time." But the court erred by declining to order dismissal of the indictment, as the Act mandates. The court improperly created an exception to the Act that does violence to its text. The court held that a judge need not make an "ends of justice" finding under Section 3161(h)(8)(A) when a defendant requests an adjournment, as long as the appellate court later ratifies the adjournment as proper. J.A.

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[12] At oral argument in *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Government cited the Speedy Trial Act as an example of a statute that could not be waived. *See* Transcript of Oral Argument, *Mezzanatto*, 1994 WL 757606 (No. 93-1340).

203. This holding contradicts the plain language of the Act, which states that "[n]o * * * period of delay" resulting from a continuance granted at the request of the defendant or his counsel "shall be excludable" unless the continuance was granted based on the court's "findings[,]" supported by reasons set forth "orally or in writing," that the need for delay outweighs the public's interest in a speedy trial. 18 U.S.C. § 3161(h)(8)(A). By disregarding this unambiguous text, the court of appeals violated this Court's "cardinal canon" of statutory construction: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Neither petitioner's purported waiver "for all time" nor his lawyer's request for a three-month adjournment in 1997 was effective to toll the Act's time limits. Accordingly, this 90-day delay exceeded the Act's 70-day time limit and the indictment must be dismissed. 18 U.S.C. § 3162(a)(2).

II. The court of appeals further erred by holding that a violation of the Act's 70-day time limit for bringing an indicted defendant to trial is subject to harmless-error analysis. The plain language of the dismissal provision, Section 3162(a)(2), requires dismissal of the indictment for any violation, even where no harm results. The presence or absence of harm is a factor to be considered along with the other statutory factors "[i]n determining whether to dismiss the case with or without prejudice* * * *" 18 U.S.C. § 3162(a)(2). But the absence of harm is not a factor that permits a court to disregard the dismissal sanction altogether.

Applying harmless-error analysis thus violates the unambiguous "shall be dismissed" language of the Act. *See*

United States v. Taylor, 487 U.S. 326, 332 (1988) ("[T]he statute admits no ambiguity in its requirement that when * * * a violation [of the 70-day period] has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'") (quoting 18 U.S.C. § 3162(a)(2)). In effect, by holding that harmless-error analysis applies, the court interpreted the statutory directive, "the indictment shall be dismissed," to mean that "the indictment shall *not* be dismissed, unless harm has been shown." The court had no authority to so re-write the statute.

Performing harmless-error analysis also disregards the history and purpose of the dismissal provision. The mandatory dismissal provision was not enacted to prevent prejudice to any particular defendant. Rather, its purpose was to deter prosecutors and courts throughout the federal system from violating the 70-day limit. Applying harmless-error analysis on a case-by-case basis undermines the provision's deterrent effect and erodes the Act's bright-line time limit.

Finally, the court's decision to apply harmless-error analysis conflicts with this Court's unanimous decision in *Alabama v. Bozeman*, 533 U.S. 146 (2001). In *Bozeman*, the Court interpreted similar "shall be dismissed" language in another speedy trial statute, the Interstate Agreement on Detainers, 18 U.S.C. App. 2 § 2 (1970), to preclude harmless-error analysis. *Bozeman* rejected the position, adopted here by the court of appeals, that the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a) override the specific mandatory dismissal sanction contained in the statute itself.

In sum, a violation of the Act's 70-day time limit for bringing an indicted defendant to trial is not subject to harmless-error analysis. The judgment below therefore cannot stand.

ARGUMENT

I. A defendant may waive the requirements of the Speedy Trial Act only as the statute specifically permits.

A. Waiver of a statutory right is not permitted where waiver would contravene the statute's text, structure and purpose.

The Court generally "presume[s] that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). However, a "right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (quoted in *New York v. Hill*, 528 U.S. 110, 116 (2000)). Waiver of a statutory right is not allowed where there exists "some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201. For example, "an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances." *Ibid.* (citing *Crosby v. United States*, 506 U.S. 255 (1993); *Smith v. United States*, 360 U.S. 1 (1959)). Similarly, even where a statute is silent with respect to waiver, its text, structure, legislative history and underlying purposes may be inconsistent with waiver. *See Brooklyn Sav. Bank*, 324 U.S. at 705-06 (holding statute non-waivable after consulting its

"legislative policy * * * as evidenced by [the statute's] legislative history and the provisions in and structure of the [statute]"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (waiver not permitted where it "would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate") (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707).

As we now show, the Speedy Trial Act does not create a personal right that may be waived. Rather, the Act creates a public right that courts must protect even when – indeed, especially when – the litigants are content to delay the proceedings.

B. Permitting waiver of the Speedy Trial Act's 70-day time limit is inconsistent with the Act.

The district court held that a defendant may waive his rights under the Speedy Trial Act "for all time." J.A. 128-29. The court of appeals did not embrace that view, but held that a defendant waives the right to obtain dismissal by seeking delay that "could have" been excluded from the Act's 70-day time limit. J.A. 203. Recognizing either type of waiver, however, contravenes the Act's text, structure, and central purpose.

The Speedy Trial Act was enacted, first and foremost, to protect the public interest in swift justice. Congress determined that systemic delays had triggered a "crisis in the criminal justice system." S. Rep. No. 93-1021, at 6 (1974) ["1974 Senate Report"]. The fault was shared by all of the key participants in the system. Congress found that "[j]udges, prosecutors, and defense counsel in many jurisdictions have come to depend upon delay to cope with

their workloads." *Id.* at 9. There was "no effective statutory or constitutional incentive" for "judges, defense attorneys and prosecutors to come to grips with their own inefficiency." *Ibid.* Congress decided that speedy trials had to be "statutorily mandated upon the system from the outside[.]" *Ibid.*

Congress found that long delays were permitting defendants to remain free on pre-trial release for extended periods, where they could commit new offenses. The preamble of the Speedy Trial Act describes the statute as, "An Act [t]o assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." Pub. L. No. 93-619, 93rd Cong., 88 Stat. 2076 (Jan. 3, 1975), *reprinted in* A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* 375 (Fed. Judicial Center 1980) ["Partridge"]. The 1974 House Report likewise states that "[t]he purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trials." H.R. Rep. No. 93-1508, at 8 (1974).

Thus, in enacting the Speedy Trial Act, Congress determined that litigants could not be relied upon to further the public interest in swift justice. The 1974 Senate Report noted that "[o]nly very rarely is it in the defendant's interest to seek speedy trial, for in most cases it is the last thing he wants." 1974 Senate Report at 14. As Senator Ervin, the bill's principal sponsor in the Senate, explained:

> Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. * * * The overworked courts, prosecutors, and defense attorneys depend on delay in order

> to cope with their heavy caseloads. * * * To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial, because he wishes to delay his day of reckoning as long as possible.

120 Cong. Rec. 41618 (1974) (remarks of Sen. Ervin), *quoted in* Partridge at 16.

The conflict between the litigants' practice of delay and the public's interest in prompt trials was a constant theme throughout the Act's development and subsequent amendment. *See, e.g.*, S. Rep. No. 96-212, at 6 (1979) ["1979 Senate Report"] ("Practically speaking, in a memory dependent system, it may better serve the defendant's interest in avoiding conviction to create unreasonable delay. The ramifications are highly prejudicial to the public interest."); *id.* at 6-7 (the Act "reflects the legislative judgment that * * * the societal interest in prompt administration of justice * * * require[s] * * * that criminal cases be tried within a fixed period coupled with meaningful penalties for failure to do so.").

It is antithetical to the statute's purpose to permit courts, prosecutors and defense counsel – the very actors the Act was designed to regulate – to "opt out" of the statute through the simple expedient of a defendant signing a waiver. *See, e.g.*, *Willis*, 958 F.2d at 63 ("Allowing the defendant to waive the Act's provisions would compromise the public interest in speedy justice. In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence.").

Permitting waiver is also inconsistent with the comprehensive and detailed structure of the Act. The statute

sets forth a highly reticulated framework that mandates that all federal cases be tried within a fixed period of time. The Act requires that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days," plus carefully drawn excludable time periods. 18 U.S.C. § 3161(c)(1) & (h). The specific indictment-to-trial time limit was selected on the basis of studies showing "the amount of time it takes an individual who is on bail to be rearrested for a subsequent crime." 1974 House Report at 14; *accord* 1974 Senate Report at 8. The choice of the 70-day time limit thus confirms Congress's overriding aim of protecting the public. Allowing defendants to extend the time limit via a waiver would undermine this goal.

Significantly, the Act's mandatory dismissal provision contains no exception for delays that are caused or invited by the defendant or his counsel. Congress knew how to include such exceptions. Section 3164 of the Act, for example, makes the sanction for a violation of the 90-day time limit for "high risk" defendants inapplicable where the delay was the "fault of the accused or his counsel." 18 U.S.C. § 3164(c); *see also* 18 U.S.C. § 5036 (West 2005) (providing exceptions to speedy trial dismissal provision for juveniles if the delay was "caused by" or "consented to by the juvenile and his counsel").

Congress's decision not to include a similar "fault" exception for a violation of the Act's 70-day time limit was deliberate. The original Senate bill would have required dismissal only if the failure to bring the defendant to trial in time was "through no fault of his own or his counsel." S. 895, 92d Cong., 1st Sess. (1971). The 1972 Senate subcommittee bill dropped this reference to "fault" at the

request of the Department of Justice. *See* Comments on S. 895 in Letter to Sen. Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 255-56 (1971) ["1971 Senate Hearings"] ("We suggest that the concept of 'fault' be entirely eliminated and that the test be simply one of whether the time limitation has been exceeded."), *quoted in* Partridge at 198; 1974 Senate Report at 43 ("[A]t the suggestion of the [Justice] Department, S. 754 would eliminate the requirement, contained in S. 895, that to succeed on the dismissal motion the defendant must show lack of fault for the delay."). The Court should not override this considered legislative judgment by reinserting a fault exception into the Act.

Allowing waiver is also inconsistent with other provisions of the Act. The "ends of justice" provision, Section 3161(h)(8), permits a court to grant a continuance that does not count towards the 70-day time limit if certain statutory factors are considered and certain procedures are followed. The provision states, however, that "[n]o * * * period of delay" resulting from a continuance granted "at the request of the defendant or his counsel" – or at the prosecutor's request – "shall be excludable" unless the court sets forth, "in the record," "its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). It is clear from this provision that a defendant's assent to delay, standing alone, has no effect on the running of the Act's time limits.

Accordingly, this provision – "the heart of the speedy trial scheme," 1974 Senate Report at 39 – states a "no

waiver" rule. It makes clear that delay is not excludable simply because the defendant, the prosecutor, and the court agree that delay is convenient. Rather, the court must determine, after considering the appropriate statutory factors, that the need for delay "outweigh[s]" the public interest in prompt disposition. *See United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154, 1156 (9th Cir. 2000) (the Act's "ends of justice" provision is inconsistent with waiver); Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* (Dec. 1979 rev., with amendments through Oct. 1984), 106 F.R.D. 271, 300 (1984) ["*Speedy Trial Act Guidelines*"] ("The Committee believes that this ['ends of justice'] provision, considered in light of the legislative purpose underlying the Act, makes it clear that a defendant's proffer or willingness to 'waive' his rights * * * cannot justify any deferral of the trial date beyond the statutory deadline that would otherwise apply.").

The Act also explicitly permits waiver in specific circumstances, suggesting that Congress intended to "occupy the field." *Mezzanatto*, 513 U.S. at 201. For example, the Act allows a defendant to speed up the trial by waiving the right, under 18 U.S.C. § 3161(c)(2), to be tried no sooner than 30 days after the first appearance with counsel. *See* 18 U.S.C. § 3161(c)(2) ("Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."). In contrast, the Act contains no comparable waiver provision where the defendant wishes to delay the trial beyond the 70-day limit of Section 3161(c)(1). The marked contrast between

these adjacent subsections of the same statute demonstrates that the 70-day limit is not waivable. As the Court has held, "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Similarly, the Act provides only one way for a defendant to waive the right to obtain dismissal based on a violation of the 70-day time limit, *i.e.*, by not moving for dismissal before trial. 18 U.S.C. § 3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial * * * shall constitute a waiver of the right to dismissal under this section."). Had Congress intended to allow waiver in other ways, it would surely have said so. *See Barnhart*, 534 U.S. at 454 ("If Congress meant to make a preenactment successor in interest * * * liable, it could have done so clearly and explicitly.").

The 1979 Senate Report, issued in connection with the 1979 Amendments to the Act, confirms, forcefully, that this explicit waiver provision in Section 3162(a)(2) was meant to be exclusive. That Report contains a section entitled "Waiver." 1979 Senate Report at 28-30. It states that "[t]he sole reference to waiver in the Act appears in § 3162(a)(2)[.]" *Id.* at 29. The Report then declares:

> The Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal as cited above, is contrary to legislative intent

> and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

Ibid.

The Report also rejected specific arguments that had "been advanced to justify the use of waiver[.]" *Ibid.* For example, the Report dismissed the argument that "[w]aiver of the speedy trial guarantees established by the Act is properly inferred from the defendant's ability to waive the Sixth Amendment right to speedy trial." *Ibid.* The Report explained that

> the Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right – which may or may not be in accord with society's. Because of the Act's emphasis on that societal right, a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish.

Ibid.

This expression of legislative intent is clear: The narrow waiver provisions of the Act are exclusive. *See, e.g.*, *United States v. Lloyd*, 125 F.3d 1263, 1268 n.7 (9th Cir. 1997); *Saltzman*, 984 F.2d at 1091; *Carrasquillo*, 667 F.2d at 389.

Other textual features of the Act confirm its non-waivability. The 70-day time limit, for example, applies automatically to "any case" in which the defendant pleads not guilty. 18 U.S.C. § 3161(c)(1). No demand for a speedy

trial is required to trigger the clock. This "no demand" feature of the Act reinforces the conclusion that the 70-day time limit is not a personal right that may be relinquished. *See* 1979 Senate Report at 7 ("Taken together, the 'day certain' scheduling requirement and 'starting the clock' at identifiable points in the criminal justice process, whether or not the defendant demands trial, reflect the importance attached by Congress to the enforcement of the public's and the defendant's * * * right to speedy trials.").

The Act also permits a dismissal "without prejudice." This flexibility to allow reprosecution accommodates the non-waivability of the 70-day limit. A court is to consider the defendant's conduct in causing or inviting delay as one of the "facts and circumstances of the case" that counsels in favor of permitting reprosecution in the event of a violation. 18 U.S.C. § 3162(a)(2); *see Taylor*, 487 U.S. at 340, 343 (the defendant's "contribution to the delay" is to be considered in determining the nature of the dismissal). Accordingly, no unduly harsh consequences to the public flow from the non-waivability of the Act's 70-day time limit.

Further, the comprehensive structure of the Speedy Trial Act is inconsistent with waiver. The Act specifies nine separate and intricately described types of delay that are excluded from the 70-day limit. *See* 18 U.S.C. § 3161(h)(1)-(9). The broadest of these nine categories, the "ends of justice" exclusion, covers such diverse situations as plea bargaining, cooperation by the defendant, and the need for reasonable preparation by defense counsel. The Act's list of exclusions is so extensive in number and broad in scope as to compel the conclusion that it was intended to exhaust the permissible reasons for delay. *See, e.g.*, *Carrasquillo*, 667 F.2d at 388 ("[T]he list is exclusive.").

And the "ends of justice" provision makes waiver unnecessary when the legitimate need for further extension of time outweighs the public interest in proceeding expeditiously. In such a case, a court need only make the required finding. 18 U.S.C. § 3161(h)(8)(A). "It would be inconsistent with the statutory scheme to permit a defendant, through a purported 'waiver,' to relieve the court of this obligation." *Saltzman*, 984 F.2d at 1091 (quoting *Speedy Trial Act Guidelines*, 106 F.R.D. at 300).

Holding the Speedy Trial Act's 70-day time limit nonwaivable is thus fully consistent with this Court's decision in *Hill*. There, the Court held that a defendant, by seeking delay, could waive the right to be tried within the time limits of the Interstate Agreement on Detainers ("IAD"). 528 U.S. at 118.[13] The Court explicitly left open whether the time limits of the Speedy Trial Act could be waived. *Id.* at 117 n.2. The Court noted, however, that the Speedy Trial Act has several features that distinguish it from the IAD. For example, the Act's time limits begin to run automatically rather than upon request, dismissal under the Act may be without prejudice, and the Act includes express waiver provisions covering limited circumstances. *Ibid.*

In addition to these distinctive features, the Speedy Trial Act protects an important public interest – crime prevention – that the IAD does not. As *Hill* noted, the IAD applies to incarcerated prisoners who are being transferred from one jurisdiction to another. For that reason, "society's interests in assuring the defendant's presence at

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[13] *Hill* did not involve a waiver "for all time." *See Hill*, 528 U.S at 115 ("This case does not involve a purported * * * waiver of all protection of the IAD's time limits or of the IAD generally * * * * * ").

trial and in preventing further criminal activity (or avoiding the costs of pretrial detention) [were] simply not at issue." *Id.* at 117. The Speedy Trial Act, in contrast, was passed principally to address these very concerns. The public interest in speed is thus far greater under the Act than under the IAD.

In summary, the text, structure, history and purpose of the Speedy Trial Act provide "affirmative indication" of Congress's intent to preclude waiver of the 70-day time limit. *Mezzanatto*, 513 U.S. at 201. Waiver is properly found only where the defendant fails to move for dismissal before trial. 18 U.S.C. § 3162(a)(2).

C. The purported waivers relied upon by the courts below were ineffective to toll the Act's 70-day time limit.

As shown, the Act's 70-day time limit is not a personal right that may be waived. Accordingly, the court of appeals rightly refused to enforce the district court's waiver "for all time." It erred, however, by declining to order dismissal of the indictment based on the 90-day delay in 1997.

It is undisputed that the adjournment from January through May 1997 was not based on a finding that the need for the delay outweighed the public's interest in a speedy trial. On the contrary, the court's remarks suggest that it believed that no further delay served the public interest. *See, e.g.*, J.A. 85 ("This [case] is a year old. That's enough for a criminal case.").

Nevertheless, the court of appeals held dismissal was not required because the delay "could have" been excluded pursuant to the Act's "ends of justice" provision. J.A. 203.

Under the Circuit's holding, a continuance granted at the defendant's request does not count for speedy trial purposes, whether or not an "ends of justice" exclusion was actually made, so long as it "could have been" made. J.A. 203.

This holding should be reversed. Even if the district court "could have" granted an "ends of justice" exclusion for this 90-day period, it did not do so. The statute says that no period of delay "shall be excludable" – even if the defense wants it – unless the court actually "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). The district court's failure to comply with this provision means that the delay counts toward the 70-day limit. As this Court reiterated just last Term, judges "are not free to rewrite the statute that Congress has enacted." *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005).

The court of appeals also erred by opining that the public interest would not be served by allowing defendants to obtain dismissal based on delays they caused or invited. J.A. 203. As discussed, Congress decided to delete language that would have made dismissal contingent on the absence of fault. *See* pp. 22-23, *supra*. The court of appeals was bound to accept that considered congressional judgment. Any "fault" exception to the Act, if needed, must be added by Congress. *See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 377 (1990) ("identification of any exception should be left to Congress"); *Willis*, 958 F.2d at 64 ("If Congress is troubled by the effects of the dismissal remedy in these cases, it may provide an additional

exception under the Act for continuances requested by defendants. Until that time we are bound by the provisions of the Act.").

Judicial tinkering with the Speedy Trial Act is especially ill-advised because creating exceptions to the Act's "no waiver" rule threatens to engulf the rule. *See, e.g.*, *Guidry*, 493 U.S. at 377 (no exception should be made by the Court where it would be too difficult to "carve out an exception that would not swallow the rule"). Some courts, for example, hold that a defendant may not obtain dismissal based on a continuance he requested. *See, e.g.*, *Kucik*, 909 F.2d at 211. This approach, however, consumes the rule against waiver. As the Fifth Circuit has recognized, "holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." *Willis*, 958 F.2d at 64.

Some courts have also expressed concern that enforcing the statute as written could invite "sand-bagging" by defendants. *See Kucik*, 909 F.2d at 211; *Pringle*, 751 F.2d at 434. But the answer to this concern is for the Court to reaffirm the bright-line rule set forth in the statute itself: Continuances granted at the request of the defense are not excludable unless they are based on a proper "ends of justice" analysis. The clarity of this straightforward rule will make "sand-bagging" impossible because courts and prosecutors will know that a waiver by the defense does not create excludable delay. *See Blackwell*, 12 F.3d at 48 ("[We] provid[e] a bright line for the district courts to follow. In the absence of contemporaneous, articulated on-the-record findings for extending the time for trial past seventy days amounting to an acceptable ends of justice

analysis, Defendant-Appellant is entitled to have his case dismissed.").[14]

In any event, there was no "sand-bagging" by the defense here. There is no evidence that Zedner's lawyer sought the 90-day adjournment in 1997 to create a speedy trial "trap." On the contrary, he wanted more time to prepare and apparently believed the court when it said that a speedy trial waiver "for all times" was valid. J.A. 73. Moreover, it was the court, not the defense, that proposed the waiver. As the Fifth Circuit has held, "A district court is not sandbagged or otherwise misled * * * by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." *Willis*, 958 F.2d at 64.

The court of appeals was also wrong to conclude that, "[g]iven the complexity of the case and Zedner's reasonable need for additional preparations, there can be no doubt that the district court could have properly excluded this [90-day] period of time based on the ends of justice." J.A. 203. This single-defendant case was not complex; it took only a week to try. The three-month adjournment granted on January 31, 1997, moreover, was far from "reasonable." That adjournment was granted to allow counsel more time to investigate whether the $10 million "Onited States" bond, purportedly issued by the "Ministry of Finance of U.S.A.," was genuine. At that point, this case had already been pending for more than nine months, and the court failed to inquire into counsel's "due diligence" during that period.

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[14] The Act specifically authorizes the imposition of monetary and other sanctions for misconduct by defense counsel. *See* 18 U.S.C. § 3162(b).

See 18 U.S.C. § 3161(h)(8)(B)(iv) (in considering an "ends of justice" exclusion, the court must "tak[e] into account the exercise of due diligence."). And there was no possibility that the misspelled bond was genuine, as the court and the prosecutor recognized at the time the adjournment was granted. J.A. 81-86. Accordingly, it is hard to see, even hypothetically, how the court could have legitimately determined that counsel's desire for delay outweighed the public's interest in prompt disposition.

For all of these reasons, the Court should hold that the requirements of the Speedy Trial Act may be waived only in the limited circumstances the Act specifies. Because the 90-day adjournment in 1997 itself exceeded the Act's 70-day time limit, the judgment below should be reversed and the case remanded for dismissal of the indictment, with or without prejudice.

II. A violation of the Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis.

The second issue presented by this case is whether a violation of the 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis. The answer is "no." The text of the Act says that, if a defendant is not brought to trial within 70 non-excludable days, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). This language is unambiguous, mandatory, and absolute. *See United States v. Taylor*, 487 U.S. 326, 332 (1988). By specifying dismissal as the mandatory sanction for any violation of the 70-day limit, the Act embodies a legislative judgment that such a violation affects the public's substantial right to expeditious criminal proceedings. Accordingly, harmless-error

analysis is inapplicable. Instead, the Act grants courts flexibility to dismiss without prejudice to reprosecution, where appropriate. *See id.* at 343.

A. Harmless-error analysis does not apply where a statutory timing provision mandates the sanction of dismissal for a violation.

Where a statutory timing provision specifies that the indictment "shall be dismissed" in the event of a violation, courts do not have discretion to ignore that command. *See Alabama v. Bozeman*, 533 U.S. 146 (2001); *United States v. Taylor*, 487 U.S. 326 (1988).

The pertinent text of the dismissal provision of the Speedy Trial Act is clear. It provides, "If a defendant is not brought to trial within the [70-day] time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). The Court recognized the clarity of this command in *Taylor*. Although the issue in *Taylor* was how a district court should decide whether dismissal of an indictment under this provision should be with or without prejudice to reprosecution, the Court also addressed the antecedent question of whether the Act mandates that a violation of the 70-day limit must result in a dismissal. The answer was simple. As the Court declared, "[T]he statute admits no ambiguity in its requirement that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'" *Taylor*, 487 U.S. at 332 (quoting 18 U.S.C. § 3162(a)(2)). The Court recognized that the Act "mandat[es] dismissal of the indictment upon violation of precise time limits." *Taylor*, 487 U.S. at 343-44; *accord id.*

at 341 n.12 ("If the Government fails to try the defendant within the statutory time frame, the defendant is entitled to dismissal."). The Court added, "As is plain from this language, courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy* * * *" *Id.* at 333. It follows, then, that courts cannot simply decide, on harmless-error grounds, to ignore the statute's text and impose no remedy at all.[15]

In *Alabama v. Bozeman*, this Court considered dismissal language almost identical to that here and held that it left no room for harmless-error analysis. *Bozeman*, 533 U.S. at 153-54. *Bozeman* concerned the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. App. 2 § 2 (1970). The IAD contains an "anti-shuttling" provision that provides, in pertinent part, that a state that obtains a prisoner for purposes of trial must try that person within 120 days of arrival and that, if the receiving state returns the prisoner to the sending state prior to that trial, the "indictment * * * shall not be of any further force or effect, and the court shall enter an order dismissing the same

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[15] Accordingly, ten circuits have held that dismissal is mandatory. *United States v. Hastings*, 847 F.2d 920, 924 (1st Cir. 1988); *United States v Brenna*, 878 F 2d 117, 118 (3d Cir 1989) (per curiam); *United States v. Jones*, 887 F.2d 492, 494 (4th Cir 1989); *United States v. Johnson*, 29 F 3d 940, 945 (5th Cir. 1994); *United States v Dunbar*, 357 F.3d 582, 591 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1099 (2005), *United States v. Koory*, 20 F.3d 844, 846 (8th Cir 1994); *United States v Lewis*, 349 F.3d 1116, 1120 (9th Cir. 2003); *United States v. Doran*, 882 F.2d 1511, 1517 (10th Cir. 1989), *United States v. Stafford*, 697 F.2d 1368, 1371 (11th Cir. 1983); *United States v Garrett*, 720 F.2d 705, 707 (D C. Cir. 1983). One circuit has joined the Second Circuit in holding that a violation of the 70-day limit can be harmless. *United States v. Smith*, 415 F.3d 682, 686 (7th Cir. 2005), *petition for cert filed*, [U.S. Oct. 13, 2005] (No. 05-7009).

with prejudice." 18 U.S.C. App. 2 § 2, Article IV(e); *see Bozeman*, 533 U.S. at 148-49.

The Court held that this "absolute language" required dismissal of the indictment – "with prejudice" – even though the prisoner in that case had already been tried and convicted, and even though he had been returned to the sending state after only a single day. *Bozeman*, 533 U.S. at 153-54. The Court rejected Alabama's position, echoed by the court of appeals here, that a violation could be overlooked on policy grounds as "*de minimis*, technical, or harmless." *Id.* at 156. The Court reasoned that "the language of the Agreement militates against an implicit exception, for it is absolute." *Id.* at 153. As the Court noted, the statute states that the court "shall" enter an order dismissing the indictment, and "'[t]he word "shall" is ordinarily "the language of command."'" *Ibid.* (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (quoting in turn *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). The Court added that "[t]he cases Alabama cites as supporting a 'harmless error' construction involved statutes that lacked this absolute language." *Bozeman*, 533 U.S. at 153-54 (citing, *inter alia*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 716-17 (1990) (Bail Reform Act "is silent on the issue of a remedy for violations of its time limits")).[16]

The reasoning of *Bozeman* demonstrates that harmless-error analysis is inapplicable to a violation of the Speedy Trial Act's 70-day time limit. The IAD and the

[16] Similarly, the harmless-error cases cited below by the court of appeals concerned violations of the 30-day minimum trial preparation period guaranteed by Section 3161(c)(2), a provision that does not contain a sanction for its violation, as the court itself acknowledged. J.A. 206-07.

Speedy Trial Act both provide time frames in which the Government must bring criminal defendants to trial. Although the two statutes differ with respect to waiver, *see* pp. 28-29, *supra*, they contain very similar language concerning remedy. Like the mandatory dismissal provision of the IAD at issue in *Bozeman*, the pertinent language of the Speedy Trial Act is "absolute." It says that, if the 70-day period is exceeded, the "indictment shall be dismissed." 18 U.S.C. § 3162(a)(2). Accordingly, just as with a violation of the IAD, a violation of the 70-day time limit of the Speedy Trial Act cannot be harmless.

The court of appeals erroneously relied upon the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a), which state that errors that do not affect "substantial rights" should be disregarded. Nothing in these provisions supplants the Act's specific language mandating dismissal. Rule 52(a) and Section 2111, provisions of general application, do not permit a court to disregard the specific remedy mandated by the Speedy Trial Act itself. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific [provision] governs the general* * * *"). Indeed, the Government cited Section 2111 and Rule 52(a) to this Court in *Bozeman* to support the application of harmless-error analysis in that case, but not a single Justice was persuaded. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 23, *Bozeman*, 533 U.S. 146 (No. 00-492).

In addition, a violation of the Act is unlike the trial-type errors normally associated with the harmless-error doctrine. As already discussed, the Act was not enacted primarily to protect the rights of the parties or to ensure a reliable verdict at trial. Rather, it vindicates a broad

societal interest in expeditious proceedings. *See* pp. 19-21, 25-26, *supra*. That is the "substantial right" the Act is designed to protect. Thus, any violation of the Act's 70-day time limit requires dismissal of the indictment upon timely motion by the defendant.

B. Harmless-error analysis is inconsistent with the remedial framework of the Act.

Harmless-error analysis is also inconsistent with the remedial framework constructed by Section 3162(a)(2). After stating that in the case of a violation the "indictment shall be dismissed," this provision goes on to give the court the alternatives of dismissing "with or without prejudice" to reprosecution. 18 U.S.C. § 3162(a)(2). In making that determination, "the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Ibid.*

The Court recognized in *Taylor* that these factors are not relevant to the threshold inquiry of whether the indictment must be dismissed; that question is purely a matter of arithmetic because the statute "mandat[es] dismissal of the indictment upon violation of precise time limits * * * * " 487 U.S. at 344. By contrast, injury to the defendant does play a role in the next step of the process, the determination of whether the dismissal is to be with or without prejudice. *Taylor* held that prejudice is to be considered at that stage. *Id.* at 342 ("[A]bsence of prejudice" is a "consideration in favor of permitting reprosecution."). In short, the language and structure of the Act

make plain that Congress decided to impose a sanction for violations of the time limit even when the damage is to the public interest rather than to the defendant personally.

The Second Circuit's approach would distort this structure by making the presence or absence of prejudice relevant not just to the nature of the remedy but also to the question of whether dismissal is required at all. This approach would render surplus much of the dismissal provision. Specifically, the court of appeals found any violation of the Act harmless here because petitioner "failed to put forth any convincing argument that this delay prejudiced him at his trial." J.A. 208-09. But this Court has already determined in *Taylor* that lack of prejudice to the defendant's ability to try his case goes only to whether the dismissal should be with or without prejudice, and "is not dispositive" even on that question. 487 U.S. at 341. By setting a standard under which the lack of prejudice precludes any remedy, the Second Circuit's approach flatly contradicts Section 3162(a)(2), which by its terms permits a dismissal, even with prejudice, when the defendant is not harmed, based upon the totality of the other factors it lists, or, as *Taylor* notes, upon the "bad faith" or a "pattern of neglect" by the Government. *Id.* at 339. Thus, while an absence of prejudice may properly contribute to a decision to dismiss without prejudice, this single factor cannot serve to preclude any remedy at all. For that matter, dismissal without prejudice is itself a central feature of the Act, and the court of appeals should not have attempted to read it out of the statute.[17]

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[17] The Second Circuit's other basis for finding harmless error was its claim that the district court's delay in resolving the competency issue from August 2000 to March 2001 did not delay the trial because

(Continued on following page)

C. The history and purpose of the dismissal provision do not support the application of harmless-error analysis.

Not only do the text and structure of the Act mandate dismissal for any violation of the 70-day limit, the history and purpose of the dismissal provision confirm that harmless-error analysis is not appropriate.

Congress did not intend for a dismissal without prejudice to somehow cure or erase a delay in any specific case. Rather, Congress chose mandatory dismissal, with or without prejudice, as a necessary sanction to protect the public interest by deterring violations of the 70-day time limit prophylactically. Evaluating each period of delay for harmlessness would chip away at the deterrent effect and at the bright-line rule that Congress prescribed for determining whether a trial was "speedy." *See Willis*, 958 F.2d at 64 ("Congress's intent in providing for the dismissal sanction was 'to serve as a deterrent for the failure of the

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petitioner was ultimately found incompetent and because defense counsel was experiencing a difficult pregnancy in late November 2000, and was on parental leave some time later J A 195, 204-09

As for the first claim, petitioner was returned to court competent and ready for trial after testing and treatment. J.A. 196. If the district court had made a timely decision as to competency in 30 days, instead of delaying for 195 days, that treatment would have occurred some 5½ months earlier, and the trial would have been able to proceed that much sooner. As for the second claim: (a) the defense never requested a delay based on counsel's pregnancy and child birth; (b) there is no evidence in the record that the district court was aware of counsel's pregnancy, (c) counsel was available to try the case in the event a timely competency decision had been rendered in September 2000, and (d) another attorney from the Office of the Federal Defender would have been available to try the case at any time.

United States Attorney or the court to comply with the Act.'") (quoting *Pringle*, 751 F.2d at 434).

Viewed from this deterrent standpoint, the Act's mandatory dismissal provision makes perfect sense. As this Court recognized in *Taylor*, "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds.[18] Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely." 487 U.S. at 342; *see also United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983) (dismissal without prejudice serves a deterrent purpose since "the grand jury may refuse to reindict and since even if it does the defendant may be acquitted").

The Second Circuit noted the potential costs and consequences of a rule of mandatory dismissal and concluded that dismissal, without regard to harm, is "absurd," "perverse," and "illogical." J.A. 207-08. But these costs and consequences – and the certainty that they will follow whenever the Act's time limits are violated – are precisely what give the dismissal sanction its teeth.

The Second Circuit's holding also undermines the central legislative compromise embodied in Section 3162(a)(2). *See Taylor*, 487 U.S. at 333-35. Early versions

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[18] Congress later amended 18 U.S.C. § 3288 to provide a grace period from the statute of limitations to permit reindictment when an indictment is dismissed "for any reason." *See* Pub. L. No. 100-690, § 7081(a), 102 Stat. 4407 (eff. Nov. 18, 1988).

of the Act required dismissal only "with prejudice." H.R. 7107, 92d Cong., 1st Sess. (1971); S. 895, 92d Cong., 1st Sess. (1971). This inflexible sanction generated much controversy in Congress, with proponents arguing that an absolute bar to reprosecution was essential to ensure compliance with the Act's time periods and opponents arguing that this sanction was too harsh. *Taylor*, 487 U.S. at 333-34. Eventually, "a compromise was reached that incorporated, through amendments on the floor of the House of Representatives, the language that eventually became § 3162(a)(2)." *Id.* at 334. The mandatory dismissal sanction was retained, but Congress granted courts flexibility to dismiss without prejudice. The Second Circuit, however, by banishing mandatory dismissal from the statute and allowing no dismissal at all unless prejudice has been shown, violated its duty to "ensure that the purposes of the Act and the legislative compromise it reflects are given effect." *Id.* at 336.

D. The decision of the court of appeals should be vacated.

Given the unambiguous mandate of Section 3162(a)(2), a court may not ignore a violation of the 70-day time limit, as the Second Circuit did here, merely because the court believes that the case was tried to "satisfactory conclusion" and that dismissal would cause "expense" and "inefficiency." J.A. 208. As this Court has declared, "It is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *accord Richards v. United States*, 369 U.S. 1, 10 (1962) (courts "are bound

to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction.").

The court of appeals did not see why a violation of the Act's 70-day time limit by "a few days," with no "substantial adverse effect," should require dismissal. J.A. 208. The answer is as simple as it is dispositive: Because the Act so decrees. While the court of appeals opined that the public interest is better served by no dismissal in the absence of specific harm, that policy determination has already been made by Congress and cannot be disturbed. *See Bozeman*, 533 U.S. at 156 ("[T]he parties would more appropriately address these policy arguments to legislatures.").

In summary, the court of appeals erred by disregarding the text of the Speedy Trial Act. By injecting a rule of harmless error into the Act, the court violated the statute's language and structure, weakened its effectiveness, and undermined its central purpose of protecting the public. As the Justice Department advised Congress during the 1971 Senate hearings:

> [I]t may well be * * * that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings at 107, *quoted in* Partridge at 17. Accordingly, the decision below should be vacated.

CONCLUSION

For the reasons stated in Point I, the Court should reverse the judgment below and remand for dismissal of the indictment, with or without prejudice. For the reasons stated in Point II, the Court should vacate the judgment below and remand for a determination of whether the Speedy Trial Act's 70-day time limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001.

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February 21, 2006

Respectfully submitted,

EDWARD S. ZAS
Counsel of Record

BARRY D. LEIWANT
SEAN HECKER
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742

Attorneys for Petitioner

APPENDIX

Speedy Trial Act of 1974,
18 U.S.C. §§ 3161-3174 (West 2005)

CHAPTER 208 – SPEEDY TRIAL

Sec.
3161. Time limits and exclusions.
3162. Sanctions.
3163. Effective dates.
3164. Persons detained or designated as being of high risk.
3165. District plans – generally.
3166. District plans – contents.
3167. Reports to Congress.
3168. Planning process.
3169. Federal Judicial Center.
3170. Speedy trial data.
3171. Planning appropriations.
3172. Definitions.
3173. Sixth amendment rights.
3174. Judicial emergency and implementation.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with

such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable

with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant,

pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or

information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly –

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

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§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant

to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

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§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter –

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter –

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

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§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving –

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

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§ 3165. District plans – generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in

accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States

district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and fifth twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(3) Not later than June 30, 1980, each United States district court with respect to which implementation has not been ordered under section 3174(c) shall prepare and submit a plan in accordance with subsections (a) through (d) to govern the trial or other disposition of offenses within the jurisdiction of such court during the sixth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c) in effect prior to the date of enactment of this paragraph.

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

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§ 3166. District plans – contents

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications;

(8) the incidence of, and reasons for each thirty-day extension under section 3161(b) with respect to an indictment in that district; and

(9) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in the district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition;

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition; and

(7)(A) the number of new civil cases filed in the twelve-calendar-month period preceding the submission of the plan;

(B) the number of civil cases pending at the close of such period; and

(C) the increase or decrease in the number of civil cases pending at the close of such period, compared to the number pending at the close of the previous twelve-calendar-month period, and the length of time each such case has been pending.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

(f) Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by

all district courts within that circuit to implement and secure compliance with this chapter.

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§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. Such reports shall also include the following:

(1) The reasons why, in those cases not in compliance with the time limits of subsections (b) and (c) of section 3161, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay.

(2) The category of offenses, the number of defendants, and the number of counts involved in those cases which are not meeting the time limits specified in subsections (b) and (c) of section 3161.

(3) The additional judicial resources which would be necessary in order to achieve compliance with the time limits specified in subsections (b) and (c) of section 3161.

(4) The nature of the remedial measures which have been employed to improve conditions and practices in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter.

(5) If a district has experienced difficulty in complying with this chapter, but an application for relief under section 3174 has not been made, the reason why such application has not been made.

(6) The impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in each district as demonstrated by the information assembled and statistics compiled and submitted under sections 3166 and 3170.

(c) Not later than December 31, 1979, the Department of Justice shall prepare and submit to the Congress a report which sets forth the impact of the implementation of this chapter upon the office of the United States Attorney in each district and which shall also include –

(1) the reasons why, in those cases not in compliance, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay;

(2) the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States Attorneys in those districts with low compliance experience under

this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter;

(3) the additional resources for the offices of the United States Attorneys which would be necessary to achieve compliance with the time limits of subsections (b) and (c) of section 3161;

(4) suggested changes in the guidelines or other rules implementing this chapter or statutory amendments which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of this chapter; and

(5) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the litigation of civil cases by the offices of the United States Attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with this chapter.

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§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate judge, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, two private attorneys, one with substantial experience in the defense of criminal cases in the district and one with substantial experience in civil litigation in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the

group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

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§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.

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§ 3170. Speedy trial data

(a) To facilitate the planning process, the implementation of the time limits, and continuous and permanent compliance with the objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics described in sections 3166(b) and 3166(c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and 3166(c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

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§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

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§ 3172. Definitions

As used in this chapter –

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate judge, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

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§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

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§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because

they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made

pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

28 U.S.C. § 2111 (West 2005)

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 52(a) (West 2005)

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(2)

Supreme Court, U.S.
FILED
MAR 29 2006
OFFICE OF THE CLERK

No. 05-5992

In the Supreme Court of the United States

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner can challenge delay resulting from a continuance that he requested and that the Speedy Trial Act of 1974 authorizes.

2. Whether the district court committed reversible error under the Speedy Trial Act by not beginning petitioner's trial at a time when petitioner was incompetent to stand trial.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Summary of argument 10
Argument:
Petitioner is not entitled to relief under the Speedy Trial Act for periods of authorized delay that he induced or that occurred while he was incompetent .. 13
I. A defendant cannot challenge delay that he sought and the Speedy Trial Act authorizes 14
A. Parties are presumptively bound by principles of waiver and estoppel 14
B. The Speedy Trial Act does not eliminate the doctrine of judicial estoppel 16
C. Petitioner is estopped from challenging the delay he requested from January until May 1997 18
1. Ordinary principles of judicial estoppel preclude petitioner from challenging the validity of the continuance he requested 18
2. The Act does not manifest an intent to preclude the application of judicial estoppel in the circumstances of this case 23
3. Alternatively, this Court should remand so that the district court can consider whether to make an express finding excluding the relevant period from the speedy trial time 30

Table of Contents—Continued: Page

II. A defendant cannot show reversible error from the failure to begin trial at a time when the defendant was incompetent 31
A. The period between August 23, 2000, and March 7, 2001, is automatically excluded from the Speedy Trial Act clock because petitioner was not competent to stand trial 32
B. Any error in not making a more complete record on the incompetency exclusion was harmless 36
Conclusion 42

TABLE OF AUTHORITIES

Cases:

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 37, 38, 41
Allen v. *Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982) 19
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 36
Arizona v. *Washington*, 434 U.S. 497 (1978) 35
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 37
Barker v. *Wingo*, 407 U.S. 514 (1972) 14, 25, 26
Board of Tr. of the State Univ. v. *Fox*, 492 U.S. 469 (1989) 31
Bowen v. *Kendrick*, 487 U.S. 589 (1988) 31

Cases—Continued: Page

Brooklyn Sav. Bank v. *O'Neil*, 324 U.S. 697 (1945) 25
Continental Ill. Corp. v. *Commissioner*, 998 F.2d 513 (7th Cir. 1993), cert. denied, 510 U.S. 1041 (1994) 22
Cooper v. *Oklahoma*, 517 U.S. 348 (1996) 31
Davis v. *Wakelee*, 156 U.S. 680 (1895) 15
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 36
Edwards v. *Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982) 15
Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) 15, 25
Henderson v. *United States*, 476 U.S. 321 (1986) 34, 35
Hughes Masonry Co. v. *Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981) 23
Interactive Gift Express, Inc. v. *Compuserve Inc.*, 256 F.3d 1323 (Fed. Cir. 2001) 16
Johnson v. *United States*, 318 U.S. 189 (1943) 18
Jones v. *United States*, 526 U.S. 227 (1999) 27
Kontrick v. *Payne*, 540 U.S. 443 (2004) 24
Minnesota Mining & Mfg. Co. v. *Chemque, Inc.*, 303 F.3d 1294 (Fed. Cir. 2002), cert. dismissed, 538 U.S. 972 (2003) 22
Murray v. *Silberstein*, 882 F.2d 61 (3d Cir. 1989) 22
Neder v. *United States*, 527 U.S. 1 (1999) 36

Cases—Continued: Page

New Hampshire v. *Maine*, 532 U.S. 742 (2001) ..... *passim*
New Hampshire v. *Ramsey*, 366 F.3d 1 (1st Cir. 2004) 16
New York v. *Hill*, 528 U.S. 110 (2000) 14, 15, 24, 25
Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 27
Pegram v. *Herdrich*, 530 U.S. 211 (2000) 15
Peretz v. *United States*, 501 U.S. 923 (1991) 14
Rose v. *Clark*, 478 U.S. 570 (1986) 36
School Bd. v. *Arline*, 480 U.S. 273 (1987) 31
Silver v. *New York Stock Exch.*, 373 U.S. 341 (1963) 16
Strunk v. *United States*, 412 U.S. 434 (1973) 38
United States v. *Anello*, 765 F.2d 253 (1st Cir.), cert. denied, 474 U.S. 996 (1985) 32
United States v. *Baskin-Bey*, 45 F.3d 200 (7th Cir.), cert. denied, 514 U.S. 1089 and 1121 (1995) 29
United States v. *Bieganowski*, 313 F.3d 264 (5th Cir. 2002), cert. denied, 538 U.S. 1014 (2003) 30
United States v. *Booker*, 543 U.S. 220 (2005) 7
United States v. *Bryant*, 726 F.2d 510 (9th Cir. 1984) 30
United States v. *Carey*, 746 F.2d 228 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985) 40
United States v. *Culp*, 7 F.3d 613 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994) 29

Cases—Continued: Page

United States v. *Degideo*, Crim. 04-100, 2004 WL 1240669 (E.D. Pa. May 18, 2004) 34
United States v. *Dunbar*, 357 F.3d 582 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005) 28
United States v. *Edwards*, 211 F.3d 1355 (11th Cir.), cert. denied, 531 U.S. 911 (2000) 39
United States v. *Fields*, 39 F.3d 439 (3d Cir. 1994) 29
United States v. *Gambino*, 59 F.3d 353 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996) 27, 28
United States v. *Hastings*, 847 F.2d 920 (1st Cir.), cert. denied, 488 U.S. 925 (1988) 40
United States v. *Hohn*, 8 F.3d 1301 (8th Cir. 1993) 35
United States v. *Keith*, 42 F.3d 234 (4th Cir. 1994) 28
United States v. *Kucik*, 909 F.2d 206 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991) 28
United States v. *Loud Hawk*, 474 U.S. 302 (1986) 26
United States v. *Mezzanatto*, 513 U.S. 196 (1995) 14, 24, 27
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 37, 39, 40
United States v. *Morgan*, 384 F.3d 439 (7th Cir. 2004) 23
United States v. *Morrison*, 449 U.S. 361 (1981) 30

Cases—Continued: Page

United States v. *Nance*, 666 F.2d 353 (9th Cir.), cert. denied, 456 U.S. 918 (1982) 32
United States v. *Noone*, 913 F.2d 20 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991) 29
United States v. *Olano*, 507 U.S. 725 (1993) 24
United States v. *Pringle*, 751 F.2d 419 (1st Cir. 1984) 27, 28
United States v. *Stoner*, 799 F.2d 1253 (9th Cir.), cert. denied, 479 U.S. 1021 (1986) 39
United States v. *Studnicka*, 777 F.2d 652 (11th Cir. 1985) 29
United States v. *Sutter*, 340 F.3d 1022 (9th Cir. 2003), cert. denied, 541 U.S. 950 (2004) 28, 35
United States v. *Taylor*:
487 U.S. 326 (1988) 3, 38, 41
196 F.3d 854 (7th Cir. 1999), cert. denied, 529 U.S. 1081 (2000) 30
United States v. *Tobin*, 155 F.3d 636 (3d Cir. 1998), cert. denied, 525 U.S. 1171 (1999) 29
United States v. *Triumph*, No. 3:02CR81, 2004 WL 1920352 (D. Conn. Aug. 24, 2004) 34
United States v. *Vasquez*, 918 F.2d 329 (2d Cir. 1990) 34
United States v. *Vo*, 413 F.3d 1010 (9th Cir.), cert. denied, 126 S. Ct. 785 (2005) 34
United States v. *Vogl*, 374 F.3d 976 (10th Cir. 2004) 34
United States v. *Vonn*, 535 U.S. 55 (2002) 37

Cases—Continued: Page

United States v. *Westbrook*, 119 F.3d 1176 (5th Cir. 1997), cert. denied, 522 U.S. 1119 (1998) 29
United States v. *Willis*, 958 F.2d 60 (5th Cir. 1992) 28
United States v. *Wirsing*, 867 F.2d 1227 (9th Cir. 1989) 35
United States v. *Zedner*:
193 F.3d 562 (2d Cir. 1999) 6
29 F. App'x 711 (2d Cir. 2002) 7, 32
Yniguez v. *Arizona*, 939 F.2d 727 (9th Cir. 1991) 22

Constitution, statutes and rule:

U.S. Const.:
Amend. V (Due Process Clause) 31
Amend. VI 14
Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* 39
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* *passim*
18 U.S.C. 3161(b) 39
18 U.S.C. 3161(c) 39
18 U.S.C. 3161(c)(1) 2, 16, 24
18 U.S.C. 3161(c)(2) 23, 39
18 U.S.C. 3161(d)(2) 39
18 U.S.C. 3161(e) 39
18 U.S.C. 3161(h) 2, 16
18 U.S.C. 3161(h)(1)(A) 33
18 U.S.C. 3161(h)(1)(E) 2

Statutes and rule—Continued: Page

18 U.S.C. 3161(h)(1)(F) 2
18 U.S.C. 3161(h)(1)(J) 33
18 U.S.C. 3161(h)(4) ..... *passim*
18 U.S.C. 3161(h)(7) 34
18 U.S.C. 3161(h)(8) 21, 24, 30, 32, 35
18 U.S.C. 3161(h)(8)(A) 2, 3, 17, 21, 30
18 U.S.C. 3161(h)(8)(B) 17
18 U.S.C. 3161(h)(8)(B)(ii) 3
18 U.S.C. 3161(h)(8)(B)(iv) 21
18 U.S.C. 3161(h)(8)(C) 17
18 U.S.C. 3161(j)(3) 40
18 U.S.C. 3162 39
18 U.S.C. 3162(a)(1) 39
18 U.S.C. 3162(a)(2) ..... *passim*
18 U.S.C. 3162(b) 39
18 U.S.C. 3164 39
18 U.S.C. 472 3
18 U.S.C. 1344 3
18 U.S.C. 4241 34
18 U.S.C. 4241(d) 6
28 U.S.C. 2111 ..... 9, 36, 39
Fed. R. Crim. P.:
Rule 52 37
Rule 52(a) 9, 36, 39

Miscellaneous: Page

Committee on the Admin. of the Crim. Law of the Judicial Conference of the U.S., *Guidelines to the Admin. of the Speedy Trial Act of 1974, As Amended* (1984) 28

31 C.J.S. *Estoppel and Waiver* (1996) 16, 29

H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974) 17, 33, 40

H.R. Rep. No. 390, 96th Cong., 1st Sess. (1979) 21

S. Rep. No. 1021, 93d Cong., 2d Sess. (1974) 17, 25, 27, 33, 38

S. Rep. No. 212, 96th Cong., 1st Sess. (1979) 21, 26

In the Supreme Court of the United States

No. 05-5992

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 189-220) is reported at 401 F.3d 36. The memorandum and order of the district court (J.A. 128-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 24, 2005 (J.A. 221). The petition for a writ of certiorari was filed on August 22, 2005, and was granted on January 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case involves challenges under the Speedy Trial Act to two periods of delay that occurred before petitioner's trial: (1) delay from January 31, 1997, to May 2, 1997, in response to petitioner's request for a continuance for trial preparation; and (2) delay from August 23, 2000, to March 7, 2001, during which time petitioner was incompetent to stand trial. The district court rejected petitioner's challenges, and the court of appeals affirmed.

1. The Speedy Trial Act of 1974 (STA or the Act), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70 days are periods of delay resulting from the defendant's mental incompetence, 18 U.S.C. 3161(h)(4); the prompt disposition of pretrial motions, 18 U.S.C. 3161(h)(1)(F); interlocutory appeals, 18 U.S.C. 3161(h)(1)(E); and various other matters, 18 U.S.C. 3161(h). In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excluded "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "set[] forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A).

The Act provides that if a defendant is not brought to trial within the 70-day period, "the information or

indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending upon the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. In March 1996, petitioner attempted to open accounts at several financial institutions with a counterfeit $10 million bond. One of the institutions called the Secret Service, which arrested petitioner and seized three additional counterfeit bonds from him, each in the amount of $10 million. J.A. 191.

On April 16, 1996, petitioner was indicted on seven counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344, and one count of knowingly possessing counterfeit obligations of the United States, in violation of 18 U.S.C. 472. J.A. 3, 66-69. On June 7, 1996, the district court held a status conference at which petitioner's counsel failed to appear. J.A. 4. The court scheduled another status conference for June 21, 1996, and entered an order excluding the resulting delay from the speedy trial clock pursuant to 18 U.S.C. 3161(h)(8)(A). J.A. 4. When petitioner and his counsel failed to appear at that conference, the district court scheduled another one for June 26, 1996, and again entered an order excluding the resulting delay from the STA clock. *Ibid.*

At the June 26, 1996, status conference, petitioner requested time to review documents in Washington, D.C. The parties agreed, and the court found, that the case was complex. See 18 U.S.C. 3161(h)(8)(B)(ii). The court granted a continuance until September 6, 1996,

and excluded the resulting delay from the STA clock. J.A. 5-6. On September 6, 1996, the case was again adjourned, and the court entered another order of excludable delay until November 8, 1996. J.A. 6-7.

At the November 8, 1996, status conference, petitioner's counsel moved for an adjournment and said that he would "waiv[e] speedy trial" until January 1997. J.A. 71; see J.A. 7. The court informed petitioner that to obtain a continuance of that length he would have to waive his speedy trial rights "for all time" because the court had lengthy trials pending and was concerned that petitioner would invoke his speedy trial rights at a time when the court could not hold a trial. J.A. 71. The court explained that in a previous case, a defendant had tried to manipulate the court in that manner. J.A. 71-72.

Petitioner's counsel assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72. Addressing petitioner personally, the court then advised petitioner at length of his speedy trial rights. J.A. 72-77. The court stated that it was prepared to "start your trial right away," but that petitioner's counsel had requested a continuance until the end of January. J.A. 73. Petitioner stated that he understood his speedy trial rights and desired to waive them. Petitioner also represented that he was not coerced or threatened into waiving those rights, and that he was 42 years old and had completed two years of college. J.A. 75-76.

Petitioner signed a written waiver of his speedy trial rights, and the court found that he had knowingly and voluntarily waived those rights. J.A. 77, 79. The court adjourned the proceedings until January 31, 1997, and entered an order excluding the resulting delay from the STA clock because of defense counsel's need for addi-

tional preparation time. See J.A. 7, 77; C.A. App. 46-49. For the duration of the case, however, the court issued no further orders excluding time from the speedy trial clock. J.A. 192.

On January 31, 1997, the government reported ready for trial, but petitioner's counsel replied that he needed more time to research the authenticity of the bonds. J.A. 8, 81-82. Counsel explained that he had already spent "a lot of time" contacting a "lot of people," but needed "one more adjournment." J.A. 82. Petitioner's counsel also stressed that "we've waived * * * not only the speedy trial time but our right to bring a speedy trial motion." J.A. 81; see J.A. 85 ("My client has waived the speedy trial time.").

After inquiring into the need for further investigation, and determining that petitioner had requested excessive delay, the court set trial for May 5, 1997—approximately six months before petitioner requested. J.A. 82-86; see J.A. 8. In response to petitioner's reliance on waiver, the court stated that "[y]ou don't have to do it twice because once you've waived you can't get it back." J.A. 81. But the court also noted that in May, the case would be a "year old. That's enough for a criminal case." J.A. 85.

On May 2, 1997, petitioner's counsel asked to be relieved because petitioner wanted to present the frivolous defense that the bonds were genuine. Petitioner consented to a psychiatric examination, and in August 1997 he was found competent to stand trial. In the meantime, the court substituted counsel for petitioner. J.A. 192-193.

In September 1997, petitioner discharged his new attorney and represented himself. From 1997 to 1998, petitioner filed numerous motions and subpoenas di-

rected at high-ranking government officials and fictitious organizations, which caused the court to question his competency. On October 14, 1998, the day trial was scheduled to begin, the court found that petitioner was not competent to stand trial and ordered him committed for hospitalization and treatment pursuant to 18 U.S.C. 4241(d). On interlocutory appeal, the Second Circuit vacated and remanded for a new competency hearing. *United States* v. *Zedner*, 193 F.3d 562 (1999). J.A. 193-194.

On remand, the parties jointly requested that a competency hearing be held on July 10, 2000. At that hearing, Dr. Sanford Drob, the director of psychological assessment at Bellevue Hospital and the senior psychologist on the Bellevue Prison Ward, testified that petitioner understood the charges against him and could rationally talk to his attorney with one major exception: how to proceed with his defense. C.A. App. 222, 238-239. Dr. Drob concluded that petitioner's behavior was caused by a "mental illness," and explained that petitioner should be deemed competent if he were willing to present a realistic defense, but not if he persisted in the belief that the bonds were genuine. *Id.* at 240, 242-243.

In light of Dr. Drob's testimony, the court asked the parties for briefing. On August 4, 2000, petitioner's counsel filed a brief in support of petitioner's competency. The government filed a brief taking the contrary view on August 11, 2000, and petitioner filed a pro se brief on August 23, 2000. J.A. 194-195. The court did not act on the competency issue for some time.[1]

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[1] In November 2000, petitioner's counsel became unavailable to try the case because of complications from her pregnancy. One month later, the prosecutor and defense counsel discussed the case and agreed that it did not require immediate attention. J.A. 195.

On March 7, 2001, petitioner moved to dismiss the indictment on statutory and constitutional speedy trial grounds. On March 21, 2001, the court denied that motion on the grounds that the case was complex and petitioner had waived his speedy trial rights. J.A. 128-136. The court also found petitioner incompetent to stand trial. J.A. 129-135. On interlocutory appeal, the Second Circuit affirmed the finding of incompetency. *United States* v. *Zedner*, 29 F. App'x 711 (2002).

In May 2002, petitioner entered a federal medical facility for examination. Near the end of his commitment, petitioner obtained a 90-day extension of his stay. The institution released petitioner on August 27, 2002, and concluded that he was delusional but competent to stand trial. The district court accepted that conclusion and scheduled trial for April 7, 2003, at which time petitioner was convicted on six counts of attempting to defraud a financial institution. J.A. 196.[2]

3. The court of appeals affirmed the convictions, but remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). J.A. 189-220. Petitioner argued, among other things, that he was denied the right to a speedy trial under the STA based on two periods of delay: January 31 to May 2, 1997, when trial was postponed at the request of petitioner; and August 23, 2000, until March 7, 2001, when the district court had before it serious questions about petitioner's competency. See J.A. 197-198.

The court of appeals held that petitioner waived his objection to the first of the disputed periods, during which time the trial was postponed at petitioner's re-

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[2] The evidence at trial and sentencing showed that in addition to the fraud at issue here, petitioner had committed a variety of other credit card and mortgage frauds. C.A. App. 85-87, 650, 653.

quest. J.A. 199-204. After recognizing that defendants may not routinely waive their speedy trial rights, J.A. 200, the court held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request," J.A. 203.

The court of appeals explained that after petitioner waived his speedy trial rights, the district court "did not enter any orders of exclusion" from the STA's 70-day period "based on its assumption that the waiver 'for all time' removed all speedy trial issues from the case." J.A. 199. "[T]here can be no doubt," the court of appeals explained, "that the district court could have properly excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." J.A. 203-204. Thus, the court held, petitioner "cannot establish a Speedy Trial Act violation based on the grant of the delay he requested." *Ibid.* The court of appeals emphasized, however, that "district courts contemplating adjournment of trial are far better advised to make prospective 'ends of justice' findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers 'for all time' seems particularly inadvisable." J.A. 204 n.3.

As to the August 2000-March 2001 period, the court of appeals determined that petitioner "could not have been tried in this period, for two reasons": his counsel was "unavailable for trial by reason of complications resulting from her pregnancy," and petitioner "was not competent to stand trial." J.A. 204-205.

With respect to the second of those reasons, the court explained that the district court had found peti-

tioner to be incompetent and the court of appeals had affirmed that decision. J.A. 205. The STA excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4). The court of appeals noted that "[i]t might be argued" that "the delay did not *result from* the fact that [petitioner] was incompetent" to stand trial because the district court did not make a specific finding that the delay resulted from the incompetency. J.A. 205. In the court of appeals' view, "[t]he question would then be whether a defendant is entitled to have his conviction voided and the indictment dismissed by reason of the court's failure to begin trial at a time when the court could not have begun trial because the defendant was incompetent, as well as because the defendant's counsel was unavailable for trial." *Ibid.*

On that question, the court concluded that "[t]he failure to start trial when [petitioner] could not have been tried was, at worst, a harmless, technical error." J.A. 205. After recognizing that many STA violations are not harmless, the court concluded that "failure to consider the harmlessness of certain errors under the [STA] can result in perverse outcomes" and is inconsistent with 28 U.S.C. 2111 and Federal Rule of Criminal Procedure 52(a), which instruct appellate courts to disregard errors that do not affect substantial rights. J.A. 207, 208. Here, the court of appeals concluded that "the error, if any, was harmless" because petitioner could not have been tried during the time period in question and petitioner had also "failed to put forth any convincing argument that this delay prejudiced him at his trial." J.A. 208-209.

In rejecting petitioner's constitutional speedy-trial challenge, the court of appeals noted that "[m]ost of the

delay between indictment and trial was caused by [petitioner's] own requests for delay, his attempts to subpoena prominent persons and fictitious entities, the need to determine his competency to stand trial, [petitioner's] incompetency for a time, and two interlocutory appeals taken by him." J.A. 210. The court also found "no indication that [petitioner's] ability to mount an effective defense was seriously impaired. Indeed, much of the pretrial delay resulted from the wide latitude the district court granted [petitioner] to prepare his defense." J.A. 211.

SUMMARY OF ARGUMENT

I. Petitioner cannot challenge the delay he sought from January until May 1997. The STA manifests an intent to limit defendants' ability to waive the Act's protections, but it does not displace the distinct doctrine of judicial estoppel. That doctrine provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (citation omitted).

Here, petitioner's express waiver induced the district court to grant a continuance without making an express ends-of-justice finding in circumstances that make manifest that the court could and almost certainly would have made an explicit finding but for petitioner's litigation conduct. In that situation, basic principles of judicial estoppel preclude petitioner from enjoying the benefit of the continuance, but then challenging the lack of a finding. That is particularly true here, where the court effectively did make an ends-of-justice determination when it considered the relevant factors under the

STA and reduced the length of the requested continuance.

Nothing in the STA manifests an intent to override the general applicability of judicial estoppel principles. While a broad waiver rule could permit courts and defendants to evade the STA's protections, the Act does not expressly speak to the narrower question of judicial estoppel. And Congress's basic intent—that time should be excluded from the STA clock only if a court granted a limited continuance after determining that it served the ends of justice—is upheld where, as here, a court granted a continuance after analyzing the relevant factors and the court could and almost certainly would have made an express ends-of-justice finding but for petitioner's conduct. A contrary rule could thwart Congress's intent to speed criminal trials by giving defendants every incentive to delay in hopes of manufacturing an STA violation.

Alternatively, this Court should remand so that the district court can consider whether to enter an express ends-of-justice finding on the record. That remedy would be appropriate in this case because the court actually considered the appropriate factors in granting the continuance, and it almost certainly would have entered an express finding on the record but for petitioner's waiver.

II. A. The time that elapsed between August 2000 and March 2001 is excluded from the STA clock by 18 U.S.C. 3161(h)(4), which covers "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." The district court found that petitioner was incompetent during the relevant time period, and the court of appeals affirmed that determination on interlocutory appeal.

Petitioner's contention that if the court had found him incompetent sooner, he would have been treated and tried sooner, is legally irrelevant. The incompetency exclusion automatically covers the full duration of a defendant's incompetency. The STA does not invite a reviewing court to undertake a highly speculative inquiry into whether prompter action by the district court could have returned the defendant to competency any sooner. And it is far from clear that an earlier incompetency determination would have led to an earlier trial, because too many other variables affect a defendant's return to competency and the scheduling of trial.

The court of appeals stated that "[i]t might be argued" that the district court erred by not "mak[ing] a record that the delay resulted from the defendant's incompetence." J.A. 205. Such an argument would lack merit, because the record shows that petitioner was incompetent, and that is all the Act requires. Unlike the ends-of-justice exclusion, the incompetency exclusion is automatic, and therefore does not require any additional findings.

B. Even if the district court erred in not making a further record on the incompetency exclusion, the error would be harmless. Although petitioner argues (Pet. Br. 33) that "a violation of the 70-day time limit for bringing a defendant to trial is [not] subject to harmless-error analysis," that is not the potential violation identified by the court of appeals. Instead, the court of appeals focused on the potential inadequacy of the district court's findings on the causal relationship between the period of delay and petitioner's incompetence. Nothing in the Act manifests an intent to displace normal harmless-error principles with respect to *that* type of error. In addition, it would make little

sense to render judgment in petitioner's favor based on a perceived inadequacy with respect to findings on whether the delay resulted from petitioner's incompetence. Instead, the appropriate remedy for any such deficiency would be to vacate and remand for the district court to make the appropriate findings on that issue.

ARGUMENT

PETITIONER IS NOT ENTITLED TO RELIEF UNDER THE SPEEDY TRIAL ACT FOR PERIODS OF AUTHORIZED DELAY THAT HE INDUCED OR THAT OCCURRED WHILE HE WAS INCOMPETENT

This case involves two alleged defects in the record made to justify periods of authorized delay under the Speedy Trial Act. First, petitioner argues (Pet. Br. 18-33) that the time between January and May 1997 is not excluded from the STA clock because the district court did not make an express ends-of-justice finding excluding that time. Second, the court of appeals stated that the time between August 2000 and March 2001 might not be excluded because the district court allegedly did not make a record that the relevant delay resulted from petitioner's incompetency. J.A. 205. Both periods of delay were authorized by the Act, and petitioner is not entitled to dismissal based on alleged procedural defects that he induced or that occurred when he in fact could not stand trial because he was incompetent. At most, the only remedy to which petitioner would be entitled is a remand to allow the district court to determine whether to enter the necessary findings.

I. A DEFENDANT CANNOT CHALLENGE DELAY THAT HE SOUGHT AND THE SPEEDY TRIAL ACT AUTHORIZES

Petitioner challenges (Pet. Br. 18-33) the delay he caused by securing a continuance from January until May 1997. In seeking that continuance, petitioner repeatedly waived his speedy trial rights, and thereby induced the district court to grant the continuance without making express findings that would justify excluding the continuance from the STA clock—findings the court could and almost certainly would have made but for the waiver. Under those circumstances, petitioner cannot both reap the benefit of the continuance and challenge its validity under the STA.

A. Parties Are Presumptively Bound By Principles Of Waiver And Estoppel

"The most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991). "[I]n the context of a broad array of constitutional and statutory provisions," this Court has "articulated a general rule that presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000) (quoting *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995)). Because Congress legislates against that "background presumption that legal rights generally * * * are subject to waiver," the presumption can be overcome only by "some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201, 203.

Speedy trial rights are not inherently different from other rights for waiver purposes. By requesting a continuance, a defendant can waive or forfeit the Sixth Amendment right to a speedy trial, *Barker* v. *Wingo*,

407 U.S. 514, 529 (1972), as well as the statutory right to a trial within the time limits of the Interstate Agreement on Detainers (IAD), *Hill*, 528 U.S. at 118. In *Hill*, this Court explained that although the IAD's time limits benefit society as well as defendants, "[w]e allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." *Id.* at 117. "[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 384 (1979); accord *Hill*, 528 U.S. at 117.[3]

Even apart from the presumption that parties are generally free to waive their rights, the distinct doctrine of judicial estoppel limits a party's ability to profit by strategically changing his litigation position. In order to "protect the integrity of the judicial process," this Court has long held that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire* v. *Maine*, 532 U.S. at 749 (quoting *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895); *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Ibid.* (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

The terms "waiver" and "estoppel" are sometimes used interchangeably, and both doctrines are presump-

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[3] The *Hill* Court noted that the IAD and the STA differ in some respects, and "express[ed] no view" on the waivability of the STA's time limits. 528 U.S. at 117 n.2.

tively applicable because they form part of the legal backdrop against which Congress legislates. Cf. *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 363 n.14 (1963) (referring to "the presumable applicability of familiar principles of waiver * * * and estoppel"). But the two doctrines serve different purposes and demand different legal showings. Waiver is the intentional relinquishment of a known right, while judicial estoppel is based on a party's adoption of inconsistent positions. See 31 C.J.S. *Estoppel and Waiver* § 70, at 440, 442-443 (1996); *New Hampshire* v. *Ramsey*, 366 F.3d 1, 16 (1st Cir. 2004); *Interactive Gift Express, Inc.* v. *Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001). Estoppel is also a more discretionary and fact-based doctrine than waiver. See *New Hampshire* v. *Maine*, 532 U.S. at 750-751. Thus, even if a statute is interpreted to displace ordinary waiver principles, it may leave intact the context-specific protection of judicial integrity afforded by the doctrine of judicial estoppel.

B. The Speedy Trial Act Does Not Eliminate The Doctrine of Judicial Estoppel

The court of appeals correctly held that although the STA manifests an intent to limit the right to waive its speedy trial protections, it does not manifest an intent to preclude all waivers and estoppels. See J.A. 200.

The Act's limitation of the applicability of general waiver doctrine follows from its express provisions. The 70-day STA clock begins to run automatically upon a defendant's indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the 70 days are periods of delay resulting from various matters, such as a defendant's incompetency. 18 U.S.C. 3161(h). If a party de-

sires further delay, the Act provides a discretionary safety valve by excluding any "period of delay resulting from a continuance granted by any judge on his own motion *or at the request of the defendant or his counsel* or at the request of the attorney for the Government * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A) (emphasis added). The court must also "set[ ] forth, in the record of the case, either orally or in writing, its reasons for [that] finding." *Ibid.* And the Act provides an extensive, but non-exclusive list of facts for the court to consider, 18 U.S.C. 3161(h)(8)(B), as well a prohibition on granting an ends-of-justice continuance "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government," 18 U.S.C. 3161(h)(8)(C).

Under those provisions, defendants cannot unilaterally waive the requirements of the Speedy Trial Act merely by seeking continuances. Instead, the speedy trial clock is tolled under 18 U.S.C. 3161(h)(8)(A) only if the district court finds that "the ends of justice served by [granting a continuance] outweigh the best interest of the public and the defendant in a speedy trial." That requirement for judicial approval of excludable delay, based on findings that the ends of justice outweigh speedy trial interests, furthers Congress's intent to protect society's interest in timely justice. See S. Rep. No. 1021, 93d Cong., 2d Sess. 6-8, 21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 15-16, 33-34 (1974). Because allowing unilateral waiver in all circumstances could circumvent the judicial-approval requirement and the

ends-of-justice standard it protects, the court of appeals correctly noted that the public interest in "the expeditious prosecution of criminal cases" would be "undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." J.A. 200.

As the court of appeals also recognized, however, that does not mean that the Act never permits waiver or estoppel. See J.A. 203. Where, as here, a defendant's express waiver induced a district court to grant a continuance without making express ends-of-justice findings that the court could and almost certainly would have made but for the waiver, basic principles of judicial estoppel bar the defendant from challenging the validity of the continuance he requested. The integrity of the judicial process demands protection against a party's inducing a court not to make certain findings, and then seizing on that omission as a ground for reversal. Cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) (holding that defendant may not complain of error he invited). Nothing in the STA manifests an intent to preclude the application of ordinary estoppel principles in such circumstances.

C. Petitioner Is Estopped From Challenging The Delay He Requested From January Until May 1997

1. Ordinary principles of judicial estoppel preclude petitioner from challenging the validity of the continuance he requested

This Court has declined to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" because "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general

formulation of principle." *New Hampshire* v. *Maine*, 532 U.S. at 750, 751 (quoting *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). There are, however, three "factors" that "typically inform the decision whether to apply the doctrine in a particular case": (i) "a party's later position must be 'clearly inconsistent' with its earlier position"; (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position"; and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751.

a. Each of those factors is satisfied here. The inconsistency in petitioner's positions is plain. Petitioner's counsel assured the district court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72. When he requested the continuance at issue here, petitioner's counsel argued that the continuance should be granted precisely because petitioner had waived his speedy trial rights, and also because he needed additional time to prepare. J.A. 81, 85. But now, petitioner both attacks the waiver on which he premised his request for the continuance and claims that his attorney did not need the additional preparation time. Pet. Br. 19-29, 32. The contradiction could hardly be more pronounced.

This is also a case where petitioner "succeeded in persuading a court to accept [his] earlier position" and "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. at 750-751. Until the continuance at issue, the district court made express ends-of-justice findings on several occasions when petitioner requested a continuance or petitioner's failure to

appear required one. See J.A. 4-7, 191-192. But when petitioner requested the continuance at issue here—and argued that the court should grant the continuance because he had waived his speedy trial rights—the court did not make express ends-of-justice findings because it "assum[ed] that the waiver 'for all time' removed all speedy trial issues from the case." J.A. 199. If the court had not relied on petitioner's waiver, no speedy-trial dispute over the relevant time period would have arisen. The court either would have denied the continuance, or—far more likely—would have granted the continuance and expressly made the relevant findings, as it had before.

As the court of appeals explained, "there can be no doubt that the district court could have properly excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." J.A. 203-204. Indeed, the district court undertook precisely that analysis before granting the continuance. J.A. 82-86. After petitioner's counsel explained that he had diligently prepared for trial by "tak[ing] a lot of time" to contact a "lot of people" regarding the authenticity of the bonds (J.A. 82), the district court inquired into whether further research was necessary (J.A. 83-84), and told counsel that "[y]ou better get some ex-Secret Service agent" to help with the investigation. J.A. 84. The court also stressed the importance of avoiding excessive delay, and based on that concern it granted only a limited continuance until May 5, 1997, even though petitioner had asked to delay trial until the end of the year. J.A. 85-86; see J.A. 82.

Thus, in assessing the appropriate length of the continuance, the court undertook an appropriate ends-of-

justice analysis by balancing the need for additional preparation against the interest in a speedier trial. See 18 U.S.C. 3161(h)(8)(A) and (B)(iv).[4] That analysis was independent of petitioner's waiver, as the court reduced petitioner's request by more than half a year, based on the court's independent assessment. J.A. 85-86. The court failed to embody that analysis in an express ends-of-justice finding only because, as the court of appeals explained, the district court believed that petitioner's waiver made such a finding unnecessary. J.A. 199.

The application of judicial estoppel is especially appropriate here in light of the facts that the court actually undertook the relevant balancing in granting petitioner's motion in part, and that the court failed to make an express ends-of-justice finding only because of petitioner's waiver. The court's error ultimately boils down to its failure to put the correct label—the ends of justice—on its determination that a limited continuance should be granted. Thus, estoppel in this case is premised critically on inducement of the court not to make an express ends-of-justice finding. That point both confirms the appropriateness of holding petitioner estopped and shows that estoppel is not just waiver by a different

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[4] When the STA was first enacted, Section 3161(h)(8) authorized continuances in only limited circumstances. Congress later concluded, however, that parties had not received sufficient time to prepare for trial. S. Rep. No. 212, 96th Cong., 1st Sess. 25-26, 34-35 (1979). Thus, Congress amended the Act in 1979 to provide that even in non-complex cases, courts can grant continuances if failure to do so "would deny counsel for the defendant * * * the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." 18 U.S.C. 3161(h)(8)(B)(iv). Cf. H.R. Rep. No. 390, 96th Cong., 1st Sess. 3 (1979) (describing the exclusion as being "broad"). The district court granted the continuance at issue here for precisely the reason specified in Section 3161(h)(8)(B)(iv). See J.A. 82-86.

name. Estoppel relies not only on the inconsistency in a party's positions, but also on the extent to which the litigant "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. at 750-751.

b. Although petitioner argues (Pet. Br. 32) that "it was the court, not the defense, that proposed the waiver," it was petitioner who first offered to waive the speedy trial right, and the court only required that any waiver be for all time, so that petitioner could not selectively waive and later insist on trial at a time when the court could not begin trial. J.A. 71. Moreover, that exchange occurred at an earlier point in the litigation. In requesting the continuance at issue here, petitioner's counsel, not the court, raised the waiver and relied on it twice in arguing that the continuance should be granted. J.A. 81, 85. In contrast, the court cautioned petitioner's counsel that a waiver could *not* justify excessive delay. J.A. 85.

Petitioner's contention (Pet. Br. 32-33) that he was not entitled to the continuance because he did not really need additional preparation time serves only to underscore the extremity of his position. Under petitioner's view, a defendant is apparently free to induce a court to grant a continuance based on his representations, but then seek dismissal on the ground that his own representations should not have been credited. Judicial estoppel prevents precisely such an about-face. See, *e.g.*, *Minnesota Mining & Mfg. Co.* v. *Chemque, Inc.*, 303 F.3d 1294, 1302-1303 (Fed. Cir. 2002), cert. dismissed, 538 U.S. 972 (2003); *Continental Ill. Corp.* v. *Commissioner*, 998 F.2d 513, 518 (7th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *Yniguez* v. *Arizona*, 939 F.2d 727, 738-739 (9th Cir. 1991); *Murray* v. *Silberstein*,

882 F.2d 61, 66-67 (3d Cir. 1989); *Hughes Masonry Co.* v. *Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838-839 (7th Cir. 1981).

2. The Act does not manifest an intent to preclude the application of judicial estoppel in the circumstances of this case

The Act does not manifest an affirmative intent to preclude the application of such traditional estoppel principles in a way that would reward petitioner's extreme conduct. Although petitioner argues (Pet. Br. 19-29) that the text and purposes of the Act refute the district court's broad holding that defendants can waive their speedy trial rights for all time, the court of appeals did not endorse that proposition (J.A. 200), and the government does not rely on it. The provisions relied on by petitioner do not speak to the narrower question at issue here.

a. Petitioner argues (Pet. Br. 24-25) that because the Act includes two express waiver provisions, it should be read to preclude all other waivers. One of those provisions, 18 U.S.C. 3161(c)(2), governs the defendant's right to *delay* trial until 30 days after the defendant's first appearance through counsel, and therefore has no bearing on the right to a *speedy* trial within 70 days. The other provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2). Under that provision, failure to seek dismissal in a timely manner constitutes an absolute waiver, as opposed to a forfeiture that could be reviewed for plain error. *United*

States v. *Morgan*, 384 F.3d 439, 442-443 (7th Cir. 2004).[5] It does not follow, however, that no other actions could give rise to any form of waiver or estoppel. To the contrary, the *Hill* Court held that a similar argument from "negative implication" was "not clear enough to constitute the 'affirmative indication' required to overcome the ordinary presumption that waiver is available." 528 U.S. at 116 (quoting *Mezzanatto*, 513 U.S. at 201).

Nor do any other provisions of the statute rule out the application of normal estoppel principles. Petitioner is correct (Pet. Br. 23-24, 26-27) that the 70-day period begins to run automatically, 18 U.S.C. 3161(c)(1), and that courts can toll that period by granting ends-of-justice continuances under 18 U.S.C. 3161(h)(8). Although those provisions counsel against a broad waiver rule, see pp. 16-18, *supra*, they do not indicate an intent to permit litigants to abuse the system by suspending ordinary estoppel principles. They do not expressly speak to that question, and the basic intent they convey—that time should be excluded from the STA clock only if a court granted a continuance after determining that it served the ends of justice—is served when a court granted a continuance after analyzing the relevant factors and the court could and almost certainly would have made an express ends-of-justice finding but for the waiver.

Nor do the Act's remedial provisions (relied on at Pet. Br. 22, 27) manifest an intent to displace estoppel principles. While the Act states that the defendant's conduct is one of several factors to consider in determin-

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[5] In general, waiver is the intentional relinquishment of a known right, while forfeiture is the failure to assert a right in a timely manner. *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004). Waiver extinguishes an error, but forfeited errors are ordinarily reviewable for plain error. *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993).

ing whether the remedy for a violation of the 70-day period should be dismissal with or without prejudice, 18 U.S.C. 3162(a)(2), the Act does not thereby immunize defendants from any other consequences of their litigation tactics. Instead, it addresses a different question—whether any dismissal should be with or without prejudice—and articulates the various factors relevant to *that* inquiry.

b. In addition to relying on various textual provisions that do not expressly address the issue here, petitioner relies (Pet. Br. 15, 18-21) on Congress's general intent to promote the public's interest in speedy trials, an interest that is sometimes in conflict with a defendant's desire for delay. See *Barker*, 407 U.S. at 519; S. Rep. No. 1021, *supra*, at 14. In *Hill*, this Court rejected the contention that speedy trial rights under the IAD are not waivable because they protect society's interests as well as defendants'. The Court recognized that a right affecting the public interest may not be waived if the societal interest is "so central to the [statute] that it is part of the unalterable 'statutory policy.'" *Hill*, 528 U.S. at 117 (quoting *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945)). But the Court explained that waiver of the IAD's speedy trial right does not contravene the unalterable statutory policy, in large part because "[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." *Ibid.* (quoting *Gannett*, 443 U.S. at 383).

Petitioner argues (Pet. Br. 28-29) that the STA is different from the IAD because it serves the public interest in crime prevention, while the IAD applies to prisoners who are already incarcerated on other charges. See *Hill*, 528 U.S. at 117. Although that dis-

tinction may weigh in favor of holding that defendants may not routinely waive their STA rights merely by requesting continuances, it would make little sense to conclude that, in order to serve the purpose of preventing crime, a defendant should be able to seek dismissal based on a record defect he induced. It is particularly hard to fathom how the interest in crime prevention could be furthered by permitting a defendant to seek dismissal in the circumstances presented here, where petitioner sought a continuance that served the ends of justice and the court almost certainly would have made an express ends-of-justice finding but for the waiver.

Permitting such abuses of the judicial system would serve primarily to thwart the prosecution of criminals, an outcome that would hardly further the interest in crime prevention. Cf. *Barker*, 407 U.S. at 528-529 (holding that even though a defendant's failure to assert the constitutional right to a speedy trial in a timely manner does not waive the right, normal "waiver" principles apply to "delay * * * attributable to the defendant"); *United States* v. *Loud Hawk*, 474 U.S. 302, 314-315, 316-317 (1986) (holding that defendants are not ordinarily entitled to benefit from delay they caused).

Petitioner relies (Pet. Br. 25-26) on a portion of a 1979 Senate Report stating that "any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal * * *, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979). Although one committee prepared that legislative history in connection with the

1979 amendments to the Act, Congress did not enact an anti-waiver provision as part of those amendments. Thus, the relevant portion of the Senate Report is best viewed as subsequent legislative history, which is a "'hazardous basis for inferring the intent of an earlier' Congress." *Jones* v. *United States*, 526 U.S. 227, 238 (1999) (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)).

More fundamentally, reliance on estoppel is not inconsistent with the Senate Report's general rejection of waiver. It is one thing to conclude that, standing alone, a waiver should not be able to circumvent the Act's provision for ends-of-justice continuances. But it is quite another to permit a litigant, in any context, to induce a court not to make an express finding that the court readily could have made based on the facts before it, and then seek dismissal based on the absence of that finding.

Such a rule would impede Congress's intent to require sound trial management, see S. Rep. No. 1021, *supra*, at 10-12, and could thereby slow the pace of trials by encouraging defendants to delay in hopes of manufacturing STA violations. *United States* v. *Pringle*, 751 F.2d 419, 434 (1st Cir. 1984); see J.A 203; *United States* v. *Gambino*, 59 F.3d 353, 360 (2d Cir. 1995) ("The provisions of the Speedy Trial Act are not to be mistaken for the rules of a game where defense counsel's cunning strategy may effectively subvert Congress' goal of implementing sound trial management."), cert. denied, 517 U.S. 1187 (1996).[6]

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[6] Petitioner's reliance (Pet. Br. 15 n.12, 24) on guidelines issued by the Judicial Conference and a statement by the United States during the oral argument in *Mezzanatto*, *supra*, is likewise misplaced. Those statements address waiver in general, not the application of judicial

c. Although the courts of appeals have disagreed about the circumstances in which defendants should be held to their waivers, most courts to consider the question have agreed that while defendants may not ordinarily waive their speedy trial rights under the STA, they also "may not simultaneously use the Act as a sword and a shield" by disclaiming their waivers under at least some circumstances. *Pringle*, 751 F.2d at 434; see, *e.g.*, *Gambino*, 59 F.3d at 360 (collecting cases). The courts of appeals have articulated their standards in different ways, such as by holding that defendants cannot challenge delays to which they consented, *United States* v. *Kucik*, 909 F.2d 206, 210-211 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); cannot challenge continuances they requested if the continuances served the ends of justice, see, *e.g.*, *United States* v. *Keith*, 42 F.3d 234, 240 (4th Cir. 1994); or cannot challenge delays actually caused by their express waivers, see, *e.g.*, *Pringle*, 751 F.2d at 434-435.

Several courts of appeals have similarly held that defendants: may not "argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous" based on a contrary theory, *United States* v. *Willis*, 958 F.2d 60, 64 (5th Cir. 1992); see *United States* v. *Dunbar*, 357 F.3d 582, 596-597 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005); *United States* v. *Sutter*, 340 F.3d 1022, 1033 (9th Cir. 2003), cert. denied, 541 U.S. 950 (2004); may not benefit from their own delaying

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estoppel in the circumstances presented here. See Tr. of Oral Arg., *United States* v. *Mezzanatto*, No. 93-1340, 1994 WL 757606, at *3 (Nov. 2, 1994); Committee on the Admin. of the Crim. Law of the Judicial Conference of the U.S., *Guidelines to the Admin. of the Speedy Trial Act of 1974, As Amended* 62-63 (1984).

tactics, *United States* v. *Tobin*, 155 F.3d 636, 642 (3d Cir. 1998) (Alito, J.), cert. denied, 525 U.S. 1171 (1999); *United States* v. *Culp*, 7 F.3d 613, 617 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994); *United States* v. *Noone*, 913 F.2d 20, 28 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Studnicka*, 777 F.2d 652, 658 (11th Cir. 1985); and may not otherwise "seek 'to turn the benefit [a defendant] accepted into an error that would undo his conviction,'" *United States* v. *Westbrook*, 119 F.3d 1176, 1188 (5th Cir. 1997) (citation omitted), cert. denied, 522 U.S. 1119 (1998); see *United States* v. *Baskin-Bey*, 45 F.3d 200, 204 (7th Cir.), cert. denied, 514 U.S. 1089 and 1121 (1995); cf. *United States* v. *Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Alito, J.) ("[D]efendants cannot be wholly free to abuse the system by requesting (h)(8) continuances and then argue that their convictions should be vacated because the continuances they acquiesced in were granted.") (citation omitted).

Although the courts of appeals, including the court below, have generally treated the issue as being one of waiver rather than estoppel, the terms are sometimes used interchangeably. See 31 C.J.S., *supra*, § 70, at 440; pp. 15-16, *supra*. Whichever terminology is used, the point is the same: the Act does not manifest an intent to permit defendants to challenge delays they requested if their express waivers induced the courts to grant the continuances without making express ends-of-justice findings the courts could and almost certainly would have made but for the waivers.[7]

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[7] As this Court has explained, judicial estoppel is a discretionary equitable doctrine that does not ordinarily lend itself to bright-line rules. See *New Hampshire* v. *Maine*, 532 U.S. at 750, 751; p. 18, *supra*. To resolve this case, the Court need not decide whether estoppel would

3. Alternatively, this Court should remand so that the district court can consider whether to make an express finding excluding the relevant period from the speedy trial time

Alternatively, this Court should remand to permit the district court to consider whether to enter an express ends-of-justice finding. Section 3161(h)(8) specifies that an excludable continuance must be based on a finding that the ends of justice warrant the continuance, and the reasons for that finding must be set forth in the record. 18 U.S.C. 3161(h)(8)(A). Such a finding need not, however, be entered on the record at the same time a continuance is granted. Instead, the requirements of the Act are satisfied if the court actually engaged in the required ends-of-justice analysis before granting the continuance, and entered an express finding on the record later. *E.g.*, *United States* v. *Bieganowski*, 313 F.3d 264, 283 (5th Cir. 2002), cert. denied, 538 U.S. 1014 (2003); *United States* v. *Taylor*, 196 F.3d 854, 861 (7th Cir. 1999), cert. denied, 529 U.S. 1081 (2000); *United States* v. *Bryant*, 726 F.2d 510, 511 (9th Cir. 1984).

Here, the court engaged in the appropriate ends-of-justice balancing before granting the continuance, but never made an express finding on the record because of petitioner's waiver. See pp. 19-21, *supra*. In such circumstances, if the Court were to conclude that waiver or estoppel principles did not apply, remand would be appropriate. As this Court has explained, "remedies should be tailored to the injury * * * and should not unnecessarily infringe on competing interests." *United*

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apply in other circumstances, including those in which it is less clear that the court would have entered an express ends-of-justice finding but for the waiver.

States v. *Morrison*, 449 U.S. 361, 364 (1981). Remanding for fact finding would be a narrow and targeted remedy that would address the absence of an express ends-of-justice finding while potentially avoiding the prejudice that the government and the public interest in crime prevention would otherwise suffer from petitioner's about-face. Cf. *Board of Tr. of the State Univ.* v. *Fox*, 492 U.S. 469, 476 (1989) ("[R]emand was correct, since further factual findings had to be made."); *Bowen* v. *Kendrick*, 487 U.S. 589, 620-621 (1988); *School Bd.* v. *Arline*, 480 U.S. 273, 288-289 (1987).[8]

II. A DEFENDANT CANNOT SHOW REVERSIBLE ERROR FROM THE FAILURE TO BEGIN TRIAL AT A TIME WHEN THE DEFENDANT WAS INCOMPETENT

The second period of challenged delay, from August 23, 2000, until March 7, 2001, did not violate the STA because petitioner was not competent to stand trial during that period. Because the Due Process Clause bars the trial of a mentally incompetent defendant, *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996), "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial" is excluded from the STA's 70-day clock. 18 U.S.C. 3161(h)(4). Although the court of appeals concluded that "any" violation during the challenged time period was harmless, J.A. 209, the court of appeals did not actually find any error, and there was none. Moreover, the only "argu[able]" error identified by the court of appeals was an alleged failure to make a more complete

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[8] To the extent that the error here were viewed as the absence of an express finding that the ends of justice justified the delay, that omission might also be considered harmless in the circumstances of this case. See pp. 35-41, *infra*.

record on the incompetency exclusion. J.A. 205. The court of appeals correctly held that any such "technical" error of that nature is subject to harmless-error analysis, and was harmless here. *Ibid*. At most, petitioner would be entitled to a remand for the district court to make findings on the effect of petitioner's incompetence on the challenged period of delay.[9]

A. The Period Between August 23, 2000, And March 7, 2001, Is Automatically Excluded From The Speedy Trial Act Clock Because Petitioner Was Not Competent To Stand Trial

1. Petitioner was incompetent to stand trial between August 2000 and March 2001. On July 10, 2000, the district court held a competency hearing at which Dr. Drob testified that petitioner had a "mental illness" and should be considered incompetent to stand trial if he persisted in the delusional belief that the bonds were genuine. C.A. App. 240, 242-243. The parties filed post-hearing briefs between August 4, 2000, and August 23, 2000, and the court found on March 21, 2001, that petitioner was not competent to stand trial. J.A. 128-136, 194-195. On interlocutory appeal, the court of appeals affirmed that finding. *United States* v. *Zedner*, 29 F. App'x 711 (2d Cir. 2002).

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[9] As an alternative ground for affirmance, the court of appeals also relied on defense counsel's unavailability. J.A. 204-205. The unavailability of defense counsel is an appropriate basis for an ends-of-justice continuance under 18 U.S.C. 3161(h)(8). See, *e.g.*, *United States* v. *Anello*, 765 F.2d 253, 258 (1st Cir.), cert. denied, 474 U.S. 996 (1985); *United States* v. *Nance*, 666 F.2d 353, 358 (9th Cir.), cert. denied, 456 U.S. 918 (1982). The district court did not, however, grant a continuance during the relevant time period. Thus, the government does not rely on that rationale.

The court's finding of incompetency necessarily encompassed the entire period between August 23, 2000, and March 7, 2001, because the finding was based on testimony, evidence, and argument presented *before* that period began. See J.A. 129-135. Thus, Section 3161(h)(4) excludes the entire period from the STA clock. Br. in Opp. 15-16.[10]

2. Petitioner argues (Pet. Br. 13-14, 39-40 n.17) that the incompetency exclusion does not apply because if the court had found him incompetent sooner, he would have been treated and tried sooner. That contention is legally irrelevant and unduly speculative.

Under the STA, the only question is whether delay "result[ed] from" petitioner's incompetency. 18 U.S.C. 3161(h)(1)(A). The delay between August 2000 and March 2001 resulted at least in part from petitioner's incompetency because he could not have been tried when he was incompetent. Whether petitioner might have been restored to competency sooner is irrelevant to that inquiry. See H.R. Rep. No. 1508, *supra*, at 33 (exclusion applies to "the period during which a defendant is incompetent to stand trial"); cf. S. Rep. No. 1021, *supra*, at 37-38 ("[T]he length of time required for [a defendant] to [return to competency] obviously should not be the basis of a speedy trial claim.").

The statutory context confirms that the STA does not invite inquiries into whether the court should have attempted to have petitioner's competency restored sooner. As this Court has explained, only one of the STA's exclusions is textually limited to a "reasonable

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[10] As the court of appeals noted, the first 30 days following the submission of briefing on petitioner's competency are also excluded under 18 U.S.C. 3161(h)(1)(J), which excludes up to 30 days during which a motion is under advisement. J.A. 204 n.4.

period of delay." *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (quoting 18 U.S.C. 3161(h)(7), which governs delay resulting from proceedings involving co-defendants). Apart from that exception, the STA's exclusions are generally "automatic" in that they "do[] not require that a period of delay be 'reasonable' to be excluded." *Id.* at 326-327 (citation omitted); accord, *e.g.*, *United States* v. *Vo*, 413 F.3d 1010, 1015 & n.2 (9th Cir.), cert. denied, 126 S. Ct. 785 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985-986 & n.10 (10th Cir. 2004); *United States* v. *Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990).

Thus, even if a defendant's return to competency were unreasonably delayed, the entire period of incompetency would still be automatically excluded under Section 3161(h)(4). *United States* v. *Triumph*, No. 3:02CR81, 2004 WL 1920352, at *3 (D. Conn. Aug. 24, 2004); *United States* v. *Degideo*, Crim. 04-100, 2004 WL 1240669, at *4 (E.D. Pa. May 18, 2004). The STA, in short, takes a defendant's incompetency as it finds it; the Act does not also regulate a defendant's return to competency, which is governed by other statutes, such as 18 U.S.C. 4241.

In any event, it is far from clear that an earlier competency determination would have led to an earlier trial, because too many other variables affect a defendant's competence and the scheduling of trial. Petitioner was certainly in no hurry. Although petitioner states (Pet. Br. 2) that in August 2000 he requested a trial as soon as possible, he then took an interlocutory appeal of the incompetency finding, which delayed his treatment for nearly a year, and after his challenges to receiving

treatment had failed he sought and received a 90-day extension of the time for treatment. J.A. 195-196.[11]

3. The court of appeals stated that "[t]he argument might be made that the court's failure either to make a record that the delay resulted from the defendant's incompetence or to start trial was at least potentially a technical violation of the Act." J.A. 205. Petitioner has not advanced that argument, and it is not meritorious. The record reveals that petitioner was incompetent during the time period in question, and no further information is needed to determine that the time is excluded under Section 3161(h)(4). See pp. 32-34, *supra*. While courts must make ends-of-justice findings to support continuances granted under Section 3161(h)(8), most of the Act's other exclusions, including Section 3161(h)(4), are automatic. See *Henderson*, 476 U.S. at 327; S. Rep. No. 212, *supra*, at 31, 33. Thus, they do not require supporting findings. *Sutter*, 340 F.3d at 1027; *United States* v. *Hohn*, 8 F.3d 1301, 1305 (8th Cir. 1993).

Nor does any background rule require district courts to support legal rulings with express findings. Although such findings can facilitate appellate review, they are not required where, as here, the record is adequate to permit such review. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978).

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[11] Because petitioner filed his motion to dismiss on March 7, 2001, and did not file any other motion based on subsequent time periods (see J.A. 177-178), he waived any challenge to delay occurring after March 7, 2001. See 18 U.S.C. 3162(a)(2) ("Failure of the defendant to move for dismissal * * * shall constitute a waiver of the right to dismissal."); *United States* v. *Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989) ("[A] court need only consider alleged delay which occurs prior to and including the date on which the motion is made. The right to challenge any subsequent delay is waived absent the bringing of a new motion to dismiss.").

B. Any Error In Not Making A More Complete Record On The Incompetency Exclusion Was Harmless

The court of appeals correctly held that even if the district court had erred by not "mak[ing] a record that the delay resulted from the defendant's incompetence" (J.A. 205), such error was harmless. J.A. 205-209.

1. "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Congress has likewise instructed appellate courts to "give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111. That harmless error rule is "essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)).

Even "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306. Only a "limited class of fundamental constitutional errors" that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence'" have been exempted from harmless-error review. *Neder* v. *United States*, 527 U.S. 1, 7, 8-9 (1999) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577 (1986)).

This case involves a statutory as opposed to a constitutional right, and Congress has authority to displace the fundamental harmless-error principles that would

otherwise apply to such a right. See *Alabama* v. *Bozeman*, 533 U.S. 146 (2001); *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990). A partial repeal by implication of Rule 52 is, however, "a result sufficiently disfavored, as to require strong support." *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 255 (1988).

2. At least with respect to the error alleged here, Congress has not manifested an intent to displace harmless-error review with sufficient clarity. Although petitioner argues (Pet. Br. 33) that "a violation of the 70-day time limit for bringing a defendant to trial is [not] subject to harmless-error analysis," that is not the potential violation identified by the court of appeals. Instead, the court of appeals stated that the district court's "failure *either* to make a record that the delay resulted from the defendant's incompetence *or* to start trial was at least potentially a technical violation of the Act." J.A. 205 (emphases added). Thus, although portions of the court of appeals' decision discuss harmlessness principles more broadly, see J.A. 207-208, the court correctly recognized that the specific question here is whether a "technical" failure to make a more complete record is subject to harmless-error analysis "when the court could not have begun trial because the defendant was incompetent." J.A. 205; see J.A. 208-209; Br. in Opp. 16.

Because any such technical error is not tantamount to a delay of the trial beyond the 70-day limit, petitioner's harmlessness arguments about violations of the 70-day period are beside the point. Petitioner emphasizes (Pet. Br. 33) that the Act provides that "[i]f

a defendant is not brought to trial within the [70-day] time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). The mandatory nature of that provision lends support to petitioner's argument (Pet. Br. 33-38) that violations of *the 70-day time limit* cannot be found harmless, see *Bozeman*, 533 U.S. at 153-154, but it does not address the question here.

Petitioner's arguments (Pet. Br. 38-42) on the structure and history of the Act are similarly misplaced because they focus only on the 70-day limit. As petitioner notes (*id.* at 38-39), this Court has held that "prejudice to the defendant" is relevant to the determination whether dismissal based on a violation of the 70-day limit should be with or without prejudice, *Taylor*, 487 U.S. at 334, and that conclusion arguably supports the contention that prejudice is not relevant to the threshold question whether to dismiss based on such a violation. The legislative history also suggests that Section 3162(a)(2)'s mandatory-dismissal provision was considered vital to Congress's effort to induce courts and litigants to comply with the Act's time limits. S. Rep. No. 1021, *supra*, at 16, 21-22, 42; cf. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (holding that although prejudice is relevant to whether a constitutional speedy trial violation occurred, dismissal is the only possible remedy for such a violation). Although those factors lend weight to the argument that violations of the 70-day period require dismissal without regard to harmless-error principles, they do not speak to the distinct question whether a technical failure to place findings in the record, when the delay was excludable in any event, should be reviewed for harmlessness.

3. Because the Act is silent on that question, the normal presumption in favor of harmless-error review controls. See *Montalvo-Murillo*, 495 U.S. at 716 (holding that violation of the time limits of the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, was harmless, in part because "the Act is silent on the issue of a remedy for violations of its time limits").

The STA contains several remedial provisions, but none addresses the situation here. See 18 U.S.C. 3162(a)(1) (providing for dismissal if indictment is not filed within time limit of 18 U.S.C. 3161(b)); 18 U.S.C. 3162(a)(2) (providing for dismissal if defendant is not brought to trial within time limit of 18 U.S.C. 3161(c)); 18 U.S.C. 3162(b) (providing for sanctions when attorneys deliberately delay trial without justification); 18 U.S.C. 3161(d)(2) and (e) (specifying that Section 3162 sanctions apply to violations of time limits for trials held after dismissals, mistrials, and orders for new trials); 18 U.S.C. 3164(c) (providing for "automatic review by the court of the conditions of release" in the event of an unexcused violation of the 90-day limit for trying an incarcerated defendant).

That carefully crafted scheme confirms that each remedial provision is limited to the specific situation it addresses, and does not speak to the proper treatment of other errors. Thus, harmless-error review applies under Rule 52(a) and 28 U.S.C. 2111 to violations of STA provisions that are not covered by one of the Act's mandatory-dismissal requirements. See, *e.g.*, *United States* v. *Edwards*, 211 F.3d 1355, 1358 (11th Cir.) (holding harmless a violation of 18 U.S.C. 3161(c)(2), which requires that trial not begin until 30 days after defendant's initial appearance), cert. denied, 531 U.S. 911 (2000); *United States* v. *Stoner*, 799 F.2d 1253, 1257 (9th

Cir.) (Kennedy, J.) (holding dismissal was not required based on any violation of 18 U.S.C. 3161(j)(3), which addresses trials of prisoners who had been convicted and detained on other charges), cert. denied, 479 U.S. 1021 (1986).[12]

Applying harmless-error review here is consistent with Congress's intent to increase the pace of criminal trials in a *reasonable* manner, in part to prevent further crime by defendants awaiting trial. See, *e.g.*, H.R. Rep. No. 1508, *supra*, at 14-16. Permitting a defendant to escape justice because of a technical error in making a more complete record on the reasons for delay, when delay was justified in any event, would not serve those goals. Instead, it would encourage defendants to delay in hopes of receiving a windfall, which could free them to commit more crimes. Cf. *Montalvo-Murillo*, 495 U.S. at 720 ("The end of exacting compliance with the letter of [the Bail Reform Act] cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent.").[13]

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[12] Although petitioner contends (Pet. Br. 35 n.15) that "ten circuits have held that dismissal is mandatory," all of the cited cases involve alleged violations of the STA's time limits, not the type of technical error alleged here. See, *e.g.*, *United States* v. *Hastings*, 847 F.2d 920, 921 n.1 (1st Cir.), cert. denied, 488 U.S. 925 (1988). Nor does any of those cases consider the relevance of harmless-error principles. We have found only one published case in which a court of appeals considered and rejected the application of harmless-error analysis to a violation of the STA, and that case involved an alleged violation of the 70-day limit. See *United States* v. *Carey*, 746 F.2d 228, 230 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985).

[13] In *Bozeman*, this Court held that violation of the IAD's prisoner-transfer rule requires dismissal because the IAD's mandatory-dismissal provision draws "no distinction" among prisoner transfers according to

4. In the circumstances of this case, the court of appeals correctly held that any error was harmless. The court of appeals explained both that petitioner could not have been tried during the time period in question and that petitioner had not demonstrated that any delay prejudiced his ability to defend the charges against him. J.A. 208-209. The first of those points is dispositive. Petitioner's incompetence both prevented him from being tried and excluded the relevant time period from the STA clock. Any "technical" failure by the district court to make a record that the delay resulted from petitioner's incompetence did not delay petitioner's trial. Accordingly, without regard to whether errors that delay a trial beyond the 70 days permitted by the Act can be harmless, the technical error here plainly was harmless.

5. Petitioner concludes (Pet. Br. 44) by asking this Court to vacate and remand for determination of whether the delay from August 2000 until March 2001 violated the Act. The government agrees that if there were any doubt about whether dismissal were required, the proper course would be to remand rather than to direct dismissal. It would make little sense for this Court to enter judgment in favor of a litigant based on

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their duration. 533 U.S. at 153-154. Here, however, the distinction is between substantive violations of the 70-day limit and technical failures to make a more complete record, and the Act's remedial provision applies only to the former category of errors. See pp. 36-37, *supra*.

Petitioner's reliance (Pet. Br. 33-35) on *Taylor* is also misplaced. That case involved a violation of the 70-day time limit, not a technical error. See 487 U.S. at 330. Moreover, the Court did not consider the applicability of harmless-error principles, and the parties agreed that dismissal was required and the only question before the Court was whether dismissal should be with or without prejudice. See Gov't Br. at 13-14, *Taylor*, *supra* (No. 87-573).

a district court's failure to set forth findings against him in the record. Instead, the appropriate course would be to remand to the court of appeals, which could remand to the district court for further record development and findings. See pp. 30-31, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney

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In The
Supreme Court of the United States

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

EDWARD S. ZAS
Counsel of Record

BARRY D. LEIWANT
SEAN HECKER
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. The Government's reliance on the doctrine of judicial estoppel is untimely and misplaced	2
A. The Government forfeited its judicial estoppel argument by never raising it in the lower courts	3
B. The doctrine of judicial estoppel does not preclude a party from challenging an unenforceable waiver	4
C. The doctrine of judicial estoppel does not apply to the facts of this case	5
1. Petitioner did not adopt clearly inconsistent positions, but only sought to correct a mutual mistake of law	6
2. Petitioner did not convince the district court that speedy trial waivers were valid	7
3. Estoppel is not necessary to prevent unfair advantage	8
4. The Government's own misconduct counsels against a finding of judicial estoppel	9
D. The Act does not authorize a remand for "ends of justice" findings nine years after the continuance was granted	10

TABLE OF CONTENTS – Continued

Page

II. The Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis and was exceeded in this case 11

A. The Government's reading of the Act is untenable 13

B. The Government mischaracterizes the district court's error 17

C. The indictment must be dismissed 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

1000 Friends of Maryland v. Browner, 265 F.3d 216 (4th Cir. 2001) 7

Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999) 4

Cooper v. Oklahoma, 517 U.S. 348 (1996) 13

Doherty v. Bartlett, 81 F.2d 920 (1st Cir. 1936) 5

In re Dow Corning Corp., 419 F.3d 543 (6th Cir. 2005) 5

Glavey v. United States, 182 U.S. 595 (1901) 4

Henderson v. United States, 476 U.S. 321 (1986) 12

John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26 (4th Cir. 1995) 6

Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164 (5th Cir. 1973) 6

Johnson v. Lindon City Corp., 405 F.3d 1065 (10th Cir. 2005) 7

Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933) 9

Medina v. California, 505 U.S. 437 (1992) 13

Miller v. United States, 103 F. 413 (C.C.S.D.N.Y. 1990) 4

New Hampshire v. Maine, 532 U.S. 742 (2001) 6, 7

Norton v. McOsker, 407 F.3d 501 (1st Cir. 2005) 5

U.S. ex rel. Am. Bank v. C.I.T. Constr. Inc., 944 F.2d 253 (5th Cir. 1991) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Beech-Nut Nutrition Corp., 677 F. Supp. 117 (E.D.N.Y. 1987) 7

United States v. Brooks, 697 F.2d 517 (3d Cir. 1982) 10

United States v. Frey, 735 F.2d 350 (9th Cir. 1984) 10

United States v. Janik, 723 F.2d 537 (7th Cir. 1983) 11

United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993) 3

United States v. Tunnessen, 763 F.2d 74 (2d Cir. 1985) 10

United States v. Zedner, 193 F.3d 562 (2d Cir. 1999) 4, 15

STATUTES

18 U.S.C. § 3161(c)(1) 19

18 U.S.C. § 3161(h)(1)(A) 14, 15, 17

18 U.S.C. § 3161(h)(1)(J) ..... *passim*

18 U.S.C. § 3161(h)(4) ..... *passim*

18 U.S.C. § 3161(h)(8) 12, 14, 17, 18

18 U.S.C. § 3161(h)(8)(A) 10, 11

18 U.S.C. § 3161(h)(8)(B) 10, 11

18 U.S.C. § 3162(a)(2) 10, 19

18 U.S.C. § 4241 ..... 13, 15

18 U.S.C. § 4241(d) 13, 14

18 U.S.C. § 4241(e) 13

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIAL

S. Rep. No. 1021, 93d Cong., 2d Sess. (1974) 10

OTHER AUTHORITIES

18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (2d ed. 2002) 3, 7

Thomas C. Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 Brook. L. Rev. 757 (1978) 7

PRELIMINARY STATEMENT

Petitioner's opening brief demonstrated that (1) the requirements of the Speedy Trial Act ["Act" or "STA"] may be waived only in the narrow circumstances the Act specifies (Pet. Br. 18-33); and, (2) a violation of the Act's 70-day time limit is not subject to harmless-error analysis (*id.* 33-43). By endorsing these two bright-line rules, the Court will end the confusion that has plagued the lower courts, and ensure that prosecutors and judges understand their duty to comply with the Act's time limits.

The Government's brief is notable more for what it concedes than what it disputes. With respect to the waiver question, the Government agrees that "defendants cannot unilaterally waive the requirements of the STA" without "judicial * * * approval based on findings that the ends of justice outweigh speedy trial interests." Brief for the United States ("Gov. Br.") 16-17. The Government also concedes that the district court did not exclude the 90-day delay between January and May 1997 in accordance with the Act's "ends of justice" procedures. *Id.* 14, 18. Accordingly, because this delay exceeded the Act's 70-day limit, the indictment must be dismissed.

The Government, however, argues that, though speedy trial waivers are unenforceable, the doctrine of judicial estoppel bars petitioner from challenging this improper 90-day delay. *Id.* 14-29. But judicial estoppel does not preclude a party who signs a waiver from later arguing that it is void as against public policy. That is all petitioner did here, hardly the "extreme conduct" imagined by the Government. *Id.* 23. Moreover, petitioner's waiver was not an effort to play "fast and loose" with the court. Petitioner and his original counsel simply labored under the mistaken legal view, encouraged by the court and the prosecutor, that speedy trial waivers were valid. The doctrine of judicial estoppel does not apply to such good-faith mistakes of law. Accordingly, this Court should hold

that the purported waivers relied upon by the lower courts were invalid and remand for dismissal of the indictment.

The Government's harmless-error arguments are no more persuasive. The Government does not claim that a violation of the Act's 70-day time limit is subject to harmless-error analysis. It argues, however, that the district court's unexplained 195-day delay in deciding petitioner's competency did not exceed the Act's 70-day limit. The Government contends that this delay was automatically excluded as a "delay resulting from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4). This is sophistry. This delay did not "result from" the "fact" of Zedner's incompetency; it resulted from the court's failure to decide the competency issue promptly. Under the Government's view, a court could sit on a competency proceeding indefinitely without violating the Act, so long as it eventually finds the defendant incompetent. This makes no sense as a matter of statutory construction and would authorize indefinite delays for defendants whose competency is in question.

In short, the Act was violated by the court's failure to decide petitioner's competency until 195 days after the issue was taken under advisement. Because that violation cannot be harmless, the Court should remand for dismissal of the indictment.

ARGUMENT

I. The Government's reliance on the doctrine of judicial estoppel is untimely and misplaced.

The Government agrees that petitioner's purported waiver of the STA was ineffective to toll the 90-day delay from January 31 to May 2, 1997. Gov. Br. 17-18. The Government also concedes that the court did not properly exclude this delay from the STA clock. *Id.* 17, 20-21. Nevertheless, the Government contends that judicial estoppel bars petitioner from challenging this delay

because his waiver supposedly induced the court not to make ends-of-justice findings that it otherwise "could and almost certainly would have made." *Id.* 18.

The Government's estoppel argument fails. First, the Government forfeited the argument by not raising it until now. Second, judicial estoppel does not bar a party from challenging a waiver that is void as against public policy. Third, assuming judicial estoppel applies in criminal cases, none of the doctrine's elements are met here. Finally, the Government engaged in its own misconduct by asserting contradictory positions regarding petitioner's mental illness. The Government's unclean hands preclude it from invoking the equitable doctrine of judicial estoppel.

A. The Government forfeited its judicial estoppel argument by never raising it in the lower courts.

The Government forfeited its judicial estoppel argument by not raising it in either the district court or the court of appeals. *See United States v. McCaskey*, 9 F.3d 368, 378-79 (5th Cir. 1993) (judicial estoppel must be raised in district court); *U.S. ex rel. Am. Bank v. C.I.T. Constr. Inc.*, 944 F.2d 253, 258 (5th Cir. 1991) (same); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477, at 555 (2d ed. 2002) ["Wright & Miller"] ("judicial estoppel will likely come to be treated as an affirmative defense, waived by failure to plead, just as res judicata is an affirmative defense").[1]

[1] At no point below did the Government invoke the doctrine of judicial estoppel. The Government argued in the district court that the waiver "for all time" was valid and made "further orders of excludable delay unnecessary." J.A. 150. It assured the court that "we will be okay in the Court of Appeals based upon your Honor's waiver for all time." J.A. 176. On appeal, the Government argued that the waiver was

(Continued on following page)

While a court may, in exceptional circumstances, overlook the failure to raise judicial estoppel promptly, the Court should not do so here. On the contrary, considering the issue for the first time now would be unfair to petitioner. By not raising judicial estoppel below, the Government denied petitioner the opportunity to demonstrate that his alleged shift in position was not a manipulative effort to play "fast and loose" with the judicial system. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807 (1999) (party should be afforded meaningful opportunity to explain changed position). Accordingly, this Court should not consider the Government's eleventh-hour assertion of the doctrine.

B. The doctrine of judicial estoppel does not preclude a party from challenging an unenforceable waiver.

The Government's reliance on judicial estoppel is also misplaced. The Government argues that petitioner is estopped from challenging the delay from January to May 1997 because he agreed to waive his speedy trial rights, and the court allegedly relied upon that waiver in failing to make the requisite "ends of justice" findings. Gov. Br. 14, 18-29.

The Government is wrong. Principles of estoppel do not prevent a party from arguing that a waiver or other agreement is void as against public policy. As this Court noted long ago, "'if public policy prohibit[s] * * * a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel.'" *Glavey v. United States*, 182 U.S. 595, 609 (1901) (quoting *Miller v. United*

"effective" to exclude the delay from January to May 1997. Brief for the United States 22, *United States v. Zedner*, 401 F.3d 36 (2d Cir. 2005) (No. 04-0821).

States, 103 F. 413, 415 (C.C.S.D.N.Y. 1990)); *see also In re Dow Corning Corp.*, 419 F.3d 543, 554 (6th Cir. 2005) ("[O]ne cannot be estopped from arguing that a contract term is illegal for public policy reasons."); *Norton v. McOsker*, 407 F.3d 501, 506 (1st Cir. 2005) ("[T]he doctrine of estoppel * * * has no application to a contract * * * which is void because it violates * * * public policy.") (internal quotation omitted). In the words of one court:

> [T]he doctrine of estoppel by conduct * * * has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity.

Doherty v. Bartlett, 81 F.2d 920, 924 (1st Cir. 1936).

Accordingly, there were no "abuses of the judicial system" here, as the Government pretends. Gov. Br. 26. Petitioner simply sought to enforce the Act by arguing that the purported waivers invited by the district court were ineffective to suspend the Act.

Accepting the Government's estoppel argument would swallow the rule against speedy trial waivers. Although the waiver was ineffective, petitioner would be bound to that waiver by virtue of judicial estoppel. Such a result would effectively render the waiver enforceable, in violation of the strong congressional policy against speedy trial waivers. *See* Pet. Br. 19-29.

C. The doctrine of judicial estoppel does not apply to the facts of this case.

The requirements of judicial estoppel are not met here. Three factors "typically inform the decision whether

to apply the doctrine in a particular case": 1) "a party's later position must be 'clearly inconsistent' with its earlier position"; 2) "the party has succeeded in persuading a court to accept that party's earlier position"; and 3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The doctrine should not apply "'when a party's prior position was based on inadvertence or mistake.'" *Id.* at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)). The Court has also recognized that "broad interests of public policy may make it important to allow a change in positions that might seem inappropriate as a matter of merely private interests." *New Hampshire*, 532 U.S. at 755 (internal quotation omitted).

1. Petitioner did not adopt clearly inconsistent positions, but only sought to correct a mutual mistake of law.

Petitioner did not pursue contradictory positions. To be sure, his original lawyer assumed that petitioner's rights under the Act could be waived and agreed to waive them. But he never advanced the "position" that the waiver was valid. On the contrary, it was the court that took that position, and petitioner simply accepted it as correct.

In any event, even if there were a clear contradiction, the first position was based on a mutual mistake of law. Everyone – the court, the prosecutor, and petitioner's original lawyer – all proceeded in the good-faith but erroneous belief that speedy trial waivers were valid. Legal errors of this sort do not give rise to judicial estoppel. *See New Hampshire*, 532 U.S. at 753; *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) ("Because the rule [of judicial estoppel] looks toward cold manipulation and not an unthinking or confused blunder,

it has never been applied where plaintiff's assertions were based on * * * inadvertence[ ] or mistake.").

Further, any inconsistency concerned a pure question of law – *i.e.*, whether the Act could be waived – not contradictory assertions of fact that can trigger estoppel. *See* Wright & Miller, § 4477, at 595 ("It is difficult to imagine circumstances that would justify an invocation of judicial estoppel to preclude inconsistent positions as to a matter of pure law* * * *"); *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) ("[T]he position to be estopped must generally be one of fact rather than law or legal theory.") (citation omitted); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 226-27 (4th Cir. 2001) (refusing to apply judicial estoppel to question of law).

2. Petitioner did not convince the district court that speedy trial waivers were valid.

Petitioner also did not "persuad[e]" the district court that the requirements of the Act could be waived. *New Hampshire*, 532 U.S. at 750. On the contrary, the court persuaded *him* that this was the case. The court assured petitioner and his counsel, incorrectly, that speedy trial waivers "for all time" were valid and that "nobody has yet challenged [this position] who has read the Speedy Trial Act* * * *" J.A. 73; *see* Pet. Br. 5-6.

The trial judge adopted this legal position in 1978, almost 20 years before this case began. *See* Thomas C. Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 Brook. L. Rev. 757, 773 (1978) (rejecting view that "a defendant's consent or waiver of his rights cannot constitute a sufficient basis for an extension of the statutory time limits* * * *"). The court has adhered to this position and has solicited speedy trial waivers routinely, as evidenced by the pre-printed form he had petitioner sign. J.A. 79; *see also United States v. Beech-Nut Nutrition Corp.*, 677 F. Supp. 117, 120 (E.D.N.Y. 1987) (accepting

defendants' agreement to "formally waive the Speedy Trial Act," and purporting to "suspend all other provisions of the Act* * * *").

Under these circumstances, the court's reliance on a waiver, encouraged by the prosecutor, *see* J.A. 81, 150, cannot be blamed on petitioner. Accordingly, judicial estoppel does not apply.

3. Estoppel is not necessary to prevent unfair advantage.

The Government repeatedly asserts that, absent the waiver, the court "could have and almost certainly would have" made a finding that the need for the delay from January to May 1997 outweighed the public's interest in a speedy trial. Gov. Br. 14, 18, 26. Nothing in the record supports this speculation.

On November 8, 1996, when petitioner's first lawyer sought an adjournment until January 31, 1997, the court refused to grant the request without a "complete waiver" because of its busy docket. J.A. 71. This strongly suggests that, absent the waiver, the delay would not have been granted.

Similarly, on January 31, 1997, the court was deeply skeptical that defense counsel's professed need for additional delay – to investigate whether the "Onited States" bond was real – warranted another three-month adjournment. It was only the waiver that led the court to indulge counsel's request for additional time.[2] Absent the waiver, it is likely the court would not have found that the need for delay outweighed the public's interest in speed. Accordingly, the Government's position fails.

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[2] The Government was not pushing for a prompt trial either. It did not "report[ ] ready for trial" on January 31, 1997, as claimed (Gov. Br. 5), but simply sought a trial "sometime in 1997." J.A. 81.

4. The Government's own misconduct counsels against a finding of judicial estoppel.

As the Government concedes, judicial estoppel is an equitable doctrine, invoked at the Court's discretion. Gov. Br. 16. Accordingly, in weighing the equities, it is appropriate to consider the Government's own misconduct. *See, e.g.*, *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 243 (1933) (party invoking equity "must come into court with clean hands").

The Government's misconduct was egregious. It secured petitioner's conviction by convincing the jury of a factual proposition that contradicts both the medical evidence and the Government's own pre-trial position. In successfully opposing petitioner's request for a trial in August 2000, the prosecutor convinced both the district court and later the court of appeals that petitioner was mentally incompetent because he suffered from delusions. J.A. 90, 100-10. At trial, however, the same prosecutor argued the opposite, convincing the jury, contrary to the report of the Government's own doctors, that petitioner was "not at all delusional" (Trial Tr. 361), that his mental illness was an act, and that he had "fooled the doctors." Trial Tr. 400. Had the Government told the jury what it had successfully convinced the court before trial – that petitioner was genuinely mentally ill – he might well have been acquitted.

This about-face poses a far greater threat to the justice system than petitioner's challenge to the invalid speedy trial waiver "for all time." Accordingly, the Government should not benefit from the equitable doctrine of judicial estoppel.

D. The Act does not authorize a remand for "ends of justice" findings nine years after the continuance was granted.

The Government argues that, even if estoppel does not apply, the mandatory remedy of dismissal is unwarranted. Instead, it seeks a remand for the district court to consider, nine years after the fact, whether to make a *nunc pro tunc* "ends of justice" finding to exclude the 90-day delay in 1997. Gov. Br. 30-31. While conceding that the court did not make any such finding before granting the continuance, the Government nonetheless suggests that the district court "engaged in the appropriate ends-of-justice balancing" (*id.* 30), and should be allowed to make the requisite finding now. The Government's proposed remedy is based on a flawed premise and contradicts the clear language of the Act.

The Act requires a judge to determine – prior to granting a continuance – that the ends of justice served by the delay outweigh the best interest of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(8)(A) (continuance must be granted "on the basis of" ends-of-justice finding); *see also United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) (judge must make finding "'before granting the continuance'") (quoting S. Rep. No. 1021, at 39, 93d Cong., 2d Sess. (1974)); *United States v. Frey*, 735 F.2d 350, 352 (9th Cir. 1984) ("district court erred by making *nunc pro tunc* findings to accommodate its unwitting violation of the Act"); *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir. 1982) ("[A] judge could not grant an 'ends of justice' continuance *nunc pro tunc*, providing the after the fact justification for the unauthorized delays."). The requisite finding must be supported by reasons, set forth "orally or in writing," section 3161(h)(8)(A), upon consideration of the specific factors in section 3161(h)(8)(B). If the finding was not made, the delay is not "excludable." 18 U.S.C. § 3161(h)(8)(A). Accordingly, as no finding was made for the 90-day period here, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2).

The Government is wrong, as a factual matter, in contending that the court "engaged in the appropriate ends-of-justice balancing." Gov. Br. 30. The court, having suspended the Act via the waiver "for all time," never considered, cited, or "balanced" the "ends of justice," the "public interest," or counsel's "due diligence." 18 U.S.C. § 3161(h)(8)(A) & (B). And even after petitioner moved for dismissal in 2001 on the ground that the Act had been violated, neither the Government nor the court ever claimed that the court had made the requisite finding (or engaged in the necessary "balancing") prior to granting the 90-day continuance. J.A. 128-29 (relying on waiver).

In short, the district court failed to make the necessary statutory finding. It is too late for that finding to be made now. *See United States v. Janik*, 723 F.2d 537, 544-45 (7th Cir. 1983) ("If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment * * * , the danger is great that every continuance will be converted retroactively into a continuance creating excludable time, which is clearly not the intent of the Act.").

* * *

In sum, principles of waiver and estoppel cannot excuse the court's failure to exclude the 90-day delay in 1997 from the STA clock. Accordingly, the indictment must be dismissed.

II. The Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis and was exceeded in this case.

The Government concedes that an indictment must be dismissed under the STA if the unexcused pre-trial delay exceeds 70 days. Gov. Br. 2-3. The Government also concedes that the district court did not resolve the competency proceeding for more than 195 days after it was taken

under advisement, despite the statutory command that such decisions be made in 30 days. *Id.* 6-7, 32-33; *see* 18 U.S.C. § 3161(h)(1)(J); *Henderson v. United States*, 476 U.S. 321, 328-29 (1986).[3] The Government further agrees that defense counsel's pregnancy during part of this period did not excuse the delay. Gov. Br. 32 n.9. Lastly, the Government does not seriously dispute that a violation of the Act's 70-day time limit is not subject to harmless-error analysis, the second issue on which this Court granted certiorari. *Id.* 36-38, 40 nn.12-13. Because the Government appears to agree that such an error cannot be considered harmless, petitioner will not belabor that point, but instead will rest on his argument in the opening brief. Pet. Br. 16-18, 33-43.

If this Court agrees with the Government's concessions, it would be appropriate to rule, as requested in petitioner's opening brief, that harmless-error analysis does not apply to STA violations and to remand for a determination of whether the Act's 70-day limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001. Pet. Br. 44.

The Government advances, however, a new claim that it did not raise below and upon which this Court has not granted review. The Government contends that the district court's unexplained delay in deciding the competency proceeding was not error because the court eventually decided, after the delay, that petitioner was incompetent. Thus, the Government contends, the delay was not attributable to the court's tardiness in deciding the motion, but instead was, retroactively, a delay "resulting from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4); Gov. Br. 11-12, 31-34. Because the STA

[3] The 30-day limit can be extended if the court properly enters an "ends of justice" exclusion. 18 U.S.C. § 3161(h)(8). The court made no exclusion here.

does not exclude competency proceedings from the unambiguous requirement of section 3161(h)(1)(J) that "any proceeding" be decided within 30 days of being taken under advisement, this argument should be rejected. Therefore, if the Court decides to reach this issue and resolves both it and the harmless-error issue in petitioner's favor, the appropriate remedy is to remand with instructions to dismiss the indictment with or without prejudice.

A. The Government's reading of the Act is untenable.

The case against every indicted defendant necessarily proceeds under a presumption of mental competence because due process prohibits the criminal prosecution of a defendant who is not competent to stand trial. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Medina v. California*, 505 U.S. 437, 439 (1992). In the federal system, once a defendant's competence is in doubt, proceedings, which often include a hearing, are held under 18 U.S.C. § 4241. The issue for the court to decide is whether the defendant "is presently suffering from a mental disease or defect rendering him mentally incompetent* * * *" 18 U.S.C. § 4241(d). If the court rules that the defendant is incompetent, then, starting at that point, the defendant loses certain rights until he regains competency. Principally, the court must commit him to the custody of the Attorney General, "who shall hospitalize the defendant for treatment in a suitable facility* * * *" *Ibid.* The case may not proceed further until the defendant is restored to competency. 18 U.S.C. § 4241(d) & (e).

The STA includes a comprehensive structure for dealing with delays "resulting from" competency proceedings, and contains specific provisions that govern when that time is excluded from the speedy trial calculus. First, the period until the court takes the motion under advisement – that is, the time taken for any psychological

examination, hearing, and post-hearing briefing – is excluded by section 3161(h)(1)(A). Then, once the proceeding is under advisement, section 3161(h)(1)(J) gives the court 30 days to decide the motion. That 30-day period can be extended by an "ends of justice" exclusion made pursuant to section 3161(h)(8).

If the court finds the defendant competent, the speedy trial clock resumes running. If the court finds the defendant incompetent, however, the defendant is, as noted, committed for treatment. In that case, section 3161(h)(4) excludes the period from the finding that the defendant is incompetent until the time his competency is restored.

The Government's reading would undermine this carefully organized statutory structure by retroactively applying the section 3161(h)(4) exclusion to the time before an incompetency finding has been made, including the periods already excluded by sections 3161(h)(1)(A) and 3161(h)(1)(J). The Government assumes without any support in the record that the "finding of incompetency" here "necessarily" encompassed the time before the finding was made (Gov. Br. 33), but this is not the case. In resolving the question of petitioner's competency, the court properly utilized evidence of his behavior dating back to before his arrest. J.A. 129-35. The court's finding, however, and indeed any finding under 18 U.S.C. § 4241(d), is prospective only. Otherwise, all the criminal proceedings that preceded the finding, which in this case covered four years and included petitioner's "waiver" of his speedy trial rights, could be considered void. The question in a section 4241 proceeding is explicitly whether the defendant "is presently" incompetent.[4] The consequences of the finding

[4] The court's finding, on March 21, 2001, was also phrased in the present tense – that Mr. Zedner "is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." J.A. 135.

are prospective only, and until the finding is made, the defendant's competency has only been called into question. The STA's exclusion for incompetency under section 3161(h)(4) is similarly forward-looking. Having excluded the time needed for any examination and hearing (section 3161(h)(1)(A)) and 30 days for a decision (section 3161(h)(1)(J)), the Act then excludes prospectively the period of delay "resulting from the fact that the defendant is mentally incompetent" (section 3161(h)(4)), a "fact" that does not exist until the incompetency finding is made. The Government may be correct that the Act "takes a defendant's incompetency as it finds it" (Gov. Br. 34), but a defendant is not incompetent until the court makes that finding.[5]

The Government's reading of section 3161(h)(4) would also permit unconscionable delays in the resolution of competency proceedings. According to the Government's view, there is no limit to how long a court may take to decide a competency proceeding as long as it eventually decides that the defendant is not competent. This would effectively repeal the operation of section 3161(h)(1)(J) in competency cases and permit the court to keep a proceeding under advisement indefinitely despite the clear statutory command to decide motions within 30 days. Permitting the court to neglect a motion for months or even years is hardly what Congress intended or the language of the Act permits. It is contrary not only to the Act's purpose of requiring expeditious proceedings but also to the purpose of 18 U.S.C. § 4241, which is to secure prompt treatment for the defendant so that he can return to competency.

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[5] The court also ruled in October 1998 that petitioner was incompetent, but that ruling became a nullity when it was vacated by the court of appeals because the district court deprived petitioner of his right to counsel at the competency hearing. *See United States v. Zedner*, 193 F.3d 562 (2d Cir. 1999) (per curiam).

The Government takes the cavalier attitude that an unlimited delay in determining the competency of a defendant such as Mr. Zedner, who was successfully treated in just three months, is "legally irrelevant" to the goal of expeditious proceedings. Gov. Br. 33. But every delay in deciding the motion results in that much delay in the start of treatment, and thus in the defendant's return to court. Accordingly, the Government's position is unsupportable. *See* Pet. Br. 13-14, 39 n.17.[6]

The Government's reading of section 3161(h)(4) is also pernicious because it leaves a defendant with no ability to rein in a lengthy delay in deciding a competency motion. A speedy trial motion made 30 days, 120 days, or even a year into this delay would properly be denied because, under the Government's view, until the outcome of the motion, the court could not yet know whether the delay was attributable to its failure to decide the motion or to the fact that the defendant is mentally incompetent. Again this makes no sense. The reason for the delay, a delay which occurs in its entirety before the motion is decided, does not turn on the substantive outcome of the motion, something that is entirely independent of the delay itself. In short, section 3161(h)(4) does not apply to a court's delay in deciding a competency motion because the court's failure to decide the motion in a timely fashion does not "result[] from the fact that the defendant is mentally incompetent* * * *" 18 U.S.C. § 3161(h)(4).

Lastly, the Government's reading will lull a judge who believes a finding of incompetency is the likely result of the proceeding into allowing too much time to elapse before making a decision. If the court then concludes

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[6] The Government claims that Mr. Zedner was in "no hurry" for a trial. Gov. Br. 34. But the actions the Government cites to support this claim, such as Mr. Zedner's appeal of the incompetency finding, all relate to his extended battle to establish that he was competent so that he could have a trial "as soon as possible." *Id.* 34-35.

instead that the defendant is competent, it will be compelled to dismiss the indictment because the 70-day limit will have already run. This twist is not only illogical, it will also bring undue pressure on the court to find the defendant incompetent in order to save the indictment. Surely, limiting the resolution of competency proceedings to the bright-line 30-day period permitted by section 3161(h)(1)(J) is the only result that is consistent with the statutory language, reading the relevant sections together. Thus, contrary to the Government's contention, the exclusion in section 3161(h)(4) is not triggered until the competency proceeding is concluded and the defendant has in fact been found incompetent. The exclusion does not apply to the earlier period when the defendant's competency, while subject to question, has not yet been determined. That period is governed by sections 3161(h)(1)(A) and 3161(h)(1)(J).

B. The Government mischaracterizes the district court's error.

Because the Government cannot prevail on its reading of section 3161(h)(4) in the face of the Act's clear command to decide competency motions within 30 days, it attempts to recast the error as the district court's failure to make a "finding" that the delay resulted from petitioner's incompetency. Gov. Br. 12-13, 35-37, 39-41. First, this description assumes a fact that is not true. Since Mr. Zedner had not yet been found incompetent, the delay in deciding the motion did not result from his incompetency (*see* pp. 13-17, *supra*), and the district court never suggested it did. In addition, petitioner has never advanced this claim. Petitioner has argued consistently both in the district court and on appeal that the error was the violation of the 70-day time limit by the court's unexcused failure to decide the competency proceeding for 195 days after it was taken

under advisement. J.A. 118; Pet. Second Circuit Br. 52-53.[7] Thus, the government's straw-man characterization of petitioner's argument is both factually and legally incorrect. Indeed, the Government seems to have devised it solely for the purpose of dismissing it out of hand. Gov. Br. 35.

The Government also appears to labor under the misimpression that petitioner is claiming that the Act was violated because he was not brought to trial during the time the competency proceeding was under advisement. *Id.* 31. This is not so. The error is that more than 70 unexcused days elapsed between indictment and trial. A violation of the Act does not turn on the date that a party is ready for trial, and unexcused delay often occurs before either party is ready. For instance, if the court adjourns a case at the first appearance for six months for no good reason, that time is not excludable even though neither party could actually have started trial on that day. Thus, the correct inquiry is whether unexcused delay occurred during the period the motion was under advisement, not whether the trial could have begun during that time.

C. The indictment must be dismissed.

The application of the Act to Mr. Zedner's case is simple. As the Government agrees, the competency proceeding was taken under advisement on August 23, 2000, when the final post-hearing memorandum was filed. The court then had 30 days to render a decision before the 70-day clock resumed ticking. 18 U.S.C. § 3161(h)(1)(J). Instead, the court let the case sit idle for the next 195 days, from August 23, 2000 to March 7, 2001, at which

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[7] The court of appeals, while less than accurate in describing petitioner's arguments, did recognize that this was the error asserted. J.A. 205 (recognizing argument on Zedner's behalf that section 3161(h)(4) did not apply because "the delay did not *result from* the fact that he was incompetent") (emphasis in original).

time petitioner moved to dismiss the indictment on speedy trial grounds. At that point 165 days of unexcused delay had elapsed in deciding the motion beyond the 30 days permitted by section 3161(h)(1)(J). This 165-day delay, by itself, violated the Act because it exceeded the 70 days of unexcused delay between indictment and trial that the Act permits. 18 U.S.C. § 3161(c)(1). In addition, for the reasons stated in petitioner's opening brief (Pet. Br. 16-18, 33-43), and not disputed by the Government (Gov. Br. 36-38, 40 nn.12-13), this error cannot be considered harmless. Accordingly, pursuant to the Act, the indictment "shall be dismissed," with or without prejudice. 18 U.S.C. § 3162(a)(2).[8]

[8] In his opening brief, petitioner asked the Court to hold that the violation of the Act cannot be harmless and then remand to the court of appeals to decide whether the Act had been violated, a question that court left unresolved. Pet. Br. 44; *see* J.A. 205. If, however, the Court now accepts the Government's invitation to decide whether the 70-day limit was violated, and rules in petitioner's favor, then, contrary to the Government's position (Gov. Br. 41-42), the remedy should be to remand to the court of appeals with instructions to dismiss the indictment either with or without prejudice. *See* 18 U.S.C. § 3162(a)(2).

CONCLUSION

The Court should reverse the judgment below and remand for dismissal of the indictment with or without prejudice. In the alternative, the Court should remand for a determination of whether the Speedy Trial Act's 70-day time limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001.

Dated: New York, New York
April 11, 2006

Respectfully submitted,

EDWARD S. ZAS
Counsel of Record

BARRY D. LEIWANT
SEAN HECKER
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742

Attorneys for Petitioner

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ZEDNER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–5992. Argued April 18, 2006—Decided June 5, 2006

The Speedy Trial Act of 1974 (Act) generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance. 18 U. S. C. §3161(c)(1). Recognizing that criminal cases vary widely and that there are valid reasons for greater delay in particular cases, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. Section 3161(h)(8) permits a district court to grant a continuance and exclude the resulting delay if it makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. To promote compliance without needlessly subverting important criminal prosecutions, the Act provides that, if the trial does not begin on time and the defendant moves, before the trial's start or entry of a guilty plea, to dismiss, the district court must dismiss the charges, though it may choose whether to do so with or without prejudice.

In April 1996, petitioner was indicted on charges arising from his attempt to open accounts using counterfeit United States bonds. The District Court granted two "ends-of-justice" continuances, see §3161(h)(8). When, at a November 8 status conference, petitioner requested another delay to January 1997, the court suggested that petitioner waive the application of the Act "for all time," and produced a preprinted waiver form for petitioner to sign. At a January 31, 1997, status conference, the court granted petitioner another continuance so that he could attempt to authenticate the bonds, but made no mention of the Act and no findings to support excluding the 91 days between January 31 and petitioner's next court appearance on May 2 (1997 continuance). Four years later, petitioner filed a motion to dis-

Syllabus

miss the indictment for failure to comply with the Act, which the District Court denied based on the waiver "for all time." In a 2003 trial, petitioner was convicted. The Second Circuit affirmed. Acknowledging that a defendant's waiver of rights under the Act may be ineffective because of the public interest served by compliance with the Act, the court found an exception for situations when the defendant causes or contributes to the delay. It also suggested that the District Court could have properly excluded the 91-day period based on the ends of justice, given the case's complexity and the defense's request for additional time to prepare.

Held:

1. Because a defendant may not prospectively waive the application of the Act, petitioner's waiver "for all time" was ineffective. Pp. 9–12.

(a) The Act comprehensively regulates the time within which a trial must begin. Section 3161(h), which details numerous categories of delay that are not counted in applying the Act's deadlines, conspicuously has no provision excluding periods of delay during which a defendant waives the Act's application. It is apparent from the Act's terms that this was a considered omission. Instead of allowing defendants to opt out, the Act demands that continuances fit within one of §3161(h)'s specific exclusions. In deciding whether to grant an ends-of-justice continuance, a court must consider a defendant's need for "reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel. §3161(h)(8)(B)(iv). If a defendant could simply waive the Act's application in order to secure more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion. The Act's purposes also cut against exclusion on the grounds of mere consent or waiver. Were the Act solely designed to protect a defendant's right to a speedy trial, such an application might make sense, but the Act was also designed with the public interest firmly in mind. This interpretation is entirely in accord with the Act's legislative history. Pp. 9–11.

(b) This Court rejects the District Court's reliance on §3162(a)(2), which provides that a defendant whose trial does not begin on time is deemed to have waived the right to move for dismissal if that motion is not filed prior to trial or entry of a guilty plea. That section makes no mention of prospective waivers, and there is no reason to think that Congress wanted to treat prospective and retrospective waivers similarly. Allowing prospective waivers would seriously undermine the Act because, in many cases, the prosecution, defense, and court would all like to opt out, to the detriment of the public interest. Section 3162(a)(2)'s retrospective waiver does not pose a comparable danger. Because the prosecution and court cannot know until the

Syllabus

trial starts or the guilty plea is entered whether the defendant will forgo moving to dismiss, they retain a strong incentive to make sure the trial begins on time. Pp. 11–12.

2. Petitioner is not estopped from challenging the excludability under the Act of the 1997 continuance. Factors that "typically inform the decision whether to apply the [estoppel] doctrine in a particular case" include (1) whether "a party's later position [is] clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that . . . earlier position"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U. S. 742, 750–751. None of the three possible "positions" taken by petitioner gives rise to an estoppel. First, recognizing an estoppel based on petitioner's promise not to move for dismissal under §3162(a)(2) would entirely swallow the Act's no-waiver policy. Second, petitioner's (mistaken) agreement that waivers are enforceable does not provide a ground for estoppel because petitioner did not "succee[d] in persuading" the District Court to accept the validity of prospective waivers. On the contrary, the District Court requested the waiver and produced the form for petitioner to sign. Even if the other factors favor estoppel, they do not predominate. Finally, petitioner's representation at the January 31 status conference that a continuance was needed to gather evidence of the bonds' authenticity does not support estoppel because that position was not "clearly inconsistent" with the position that he now takes in seeking dismissal, *i.e.*, that delay from that continuance was not excluded under the Act. Nothing in the discussion at the conference suggests that the question presented by the continuance request was viewed as anything other than a case-management question laying entirely within the District Court's discretion. Pp. 12–15.

3. When a district court makes no findings on the record to support a §3161(h)(8) continuance, harmless-error review is not appropriate. The Government argues that an express finding need not be entered contemporaneously and could be supplied on remand. But the Act requires express findings, see §3161(h)(8)(A), and at the very least implies that those findings must be put on the record by the time the district court rules on the motion to dismiss. Because the District Court made no such express findings, the 1997 continuance is not excluded from the speedy trial clock. This error is not subject to harmless-error review. Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to "*all* errors where a proper objection is made," *Neder* v. *United States*, 527 U. S. 1, 7, but strong support for an implied repeal of Rule 52(a) in this context

Syllabus

is provided by the Act's unequivocal provisions, which specify that a trial "*shall* commence" within 70 days, §3161(c)(1) (emphasis added), and that "*[n]o . . . period of delay*" from an ends-of-justice continuance "*shall be excludable*" from the time period unless the court sets forth its reasoning, §3161(h)(8)(A) (emphasis added). Applying harmless-error review would also tend to undermine the detailed requirements of the provisions regulating ends-of-justice continuances. Pp. 15–18.

4. Because the 91-day continuance, which was not excluded from the speedy trial clock, exceeded the maximum 70-day delay, the Act was violated, and there is no need to address whether other periods of delay were not excludable. The District Court may determine in the first instance whether the dismissal in this case should be with or without prejudice. Pp. 18–19.

401 F. 3d 36, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, and in which SCALIA, J., joined as to all but Part III–A–2. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–5992

JACOB ZEDNER, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE ALITO delivered the opinion of the Court.

This case requires us to consider the application of the doctrines of waiver, judicial estoppel, and harmless error to a violation of the Speedy Trial Act of 1974 (Act), 18 U. S. C. §§3161–3174. The Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, §3161(c)(1), but the Act contains a detailed scheme under which certain specified periods of delay are not counted. In this case, petitioner's trial did not begin within 70 days of indictment. Indeed, his trial did not commence until more than seven years after the filing of the indictment, but petitioner, at the suggestion of the trial judge, signed a blanket, prospective waiver of his rights under the Act. We address the following questions: whether this waiver was effective; whether petitioner is judicially estopped from challenging the validity of the waiver; and whether the trial judge's failure to make the findings required to exclude a period of delay under a particular provision of the Act, §3161(h)(8), was harmless error.

I

In March 1996, petitioner attempted to open accounts at

seven financial institutions using counterfeit $10 million United States bonds. The quality of the counterfeiting was, to put it mildly, not expert. One bond purported to be issued by the "Ministry of Finance of U. S. A." 401 F. 3d 36, 39 (CA2 2005) (internal quotation marks omitted). Others contained misspelled words such as "Thunted States" and the "Onited States" (United States), "Dhtladelphla" (Philadelphia), "Cgicago" (Chicago), and "forevev" (forever). *Id.*, at 39, n. 1 (internal quotation marks omitted). After petitioner presented these bonds, the Secret Service was contacted, and petitioner was arrested. Following arraignment on a criminal complaint, he was released on bond.

On April 4, 1996, a grand jury in the Eastern District of New York indicted petitioner on seven counts of attempting to defraud a financial institution, in violation of 18 U. S. C. §1344, and one count of knowingly possessing counterfeit obligations of the United States, in violation of §472. On June 26, the District Court, citing the complexity of the case, granted what is termed an "ends-of-justice" continuance, see §3161(h)(8)(B)(ii), until September 6. On September 6, the District Court granted another continuance, this time until November 8.

At the November 8 status conference, petitioner requested, without opposition from the Government, a further adjournment to January 1997. Concerned about the difficulty of fitting petitioner's trial into its heavily scheduled calendar and the prospect that petitioner might "only waive [the Act] for so long as it is convenient for [him] to waive," the District Court instructed petitioner as follows: "I think if I'm going to give you that long an adjournment, I will have to take a waiver for all time." App. 71. Petitioner's counsel responded that the defense would "waive for all time. That will not be a problem. That will not be an issue in this case." *Id.*, at 72.

The District Court then addressed petitioner directly

and appears to have attempted to explain the operation of a provision of the Act, 18 U. S. C. §3162(a)(2), under which a defendant whose trial does not begin on time is deemed to have waived the right to move for dismissal of the information or indictment if he or she does not file that motion prior to trial or entry of a guilty plea. The District Court reasoned: "[I]f you can waive [the Act] by inaction, *i. e.*, not raising the motion to dismiss, you can waive affirmatively, knowledgeably, intelligently your right to do so, your right to a speedy trial and your right to make a motion to dismiss for the speedy trial." App. 73. The court told petitioner that it was "prepared to start . . . trial right away," *ibid.*, but that if a continuance was granted, petitioner might have to wait some time for trial because the court had a "fairly big cas[e] . . . which [wa]s set to take eight months for trial." "[I]f that [trial] starts before you start," the court warned, "you may have to wait until that is done." *Id.*, at 74.

The District Court then produced a preprinted form—apparently of its own devising—captioned "Waiver of Speedy Trial Rights." *Id.*, at 79. The court led petitioner and his counsel through the form, and both signed it. Among other things, the form stated: "I wish to waive my rights to a speedy trial . . . under the Speedy Trial Act of 1974 (18 U. S. C. §3161 *et seq.*), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court." *Ibid.* The form also stated: "I have been advised and fully understand that . . . I also waive any and all rights to make a motion to dismiss the indictment . . . against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time." *Ibid.* After the form was signed, petitioner's counsel requested that a further status conference be scheduled for January 31, 1997, and the court agreed. *Id.*, at 77.

At the January 31 status conference, petitioner sought

yet another continuance "to tap . . . the proper channels to authenticate [the] bonds." *Id.*, at 81. Petitioner and the Government emphasized that this request raised no issue under the Act because petitioner had "waived for all time," though the Government suggested that it "would like to try the case sometime in 1997." *Ibid.* After a brief discussion between the court and petitioner's counsel about the need to investigate the authenticity of what seemed such obviously fake bonds, the court offered to set trial for May 5, 1997. *Id.*, at 86. The court admonished petitioner's counsel to "[g]et to work" and noted: "This [case] is a year old. That's enough for a criminal case." *Id.*, at 86, 85. Nevertheless, apparently satisfied with petitioner's waiver "for all time," the District Court made no mention of the Act and did not make any findings to support exclusion of the 91 days between January 31 and petitioner's next court appearance on May 2, 1997 (1997 continuance).

The four years that followed saw a variety of proceedings in petitioner's case, but no trial. See 401 F. 3d, at 40–41. Counsel sought to be relieved because petitioner insisted that he argue that the bonds were genuine, and the court ultimately granted counsel's request to withdraw. At the court's suggestion, petitioner was examined by a psychiatrist, who determined that petitioner was competent to stand trial. Petitioner then asked to proceed *pro se* and sought to serve subpoenas on, among others, the President, the Chairman of the Federal Reserve Board, the Attorney General, the Secretary of State, the late Chinese leader Chiang Kai-shek, and "'The Treasury Department of Treasury International Corporation.'" *Id.*, at 40; App. 129. After a year of quashed subpoenas, the District Court set the case for trial, only to conclude on the morning of jury selection that it had to inquire once again into petitioner's competency. The court dismissed the jury panel, found petitioner incompetent, and committed him to the custody of the Attorney General for hospitalization

and treatment. On interlocutory appeal, however, the Court of Appeals vacated that order and remanded for further hearings. In July and August 2000, the District Court held those hearings and received further briefing on the competency issue.

On March 7, 2001, while the competency issue remained under submission, petitioner moved to dismiss the indictment for failure to comply with the Act. The District Court denied the motion on the ground that petitioner had waived his Speedy Trial Act rights "for all time," mentioning in passing that the case was complex. *Id.*, at 128–129. In the same order, the court found petitioner incompetent. *Id.*, at 135. That latter determination was upheld on interlocutory appeal, and petitioner was committed for evaluation. After several months of hospitalization, petitioner was found to be delusional but competent to stand trial, and he was released.

Finally, on April 7, 2003, more than seven years after petitioner was indicted, his trial began. The jury found petitioner guilty on six counts of attempting to defraud a financial institution,[1] and the court sentenced him to 63 months of imprisonment.

The Court of Appeals affirmed the judgment of conviction.[2] Acknowledging that "a defendant's waiver of rights under the Speedy Trial Act may be ineffective" because of the public interest served by compliance with the Act, the Court of Appeals found an exception for situations "'when defendant's conduct causes or contributes to a period of delay.'" 401 F. 3d, at 43–44 (quoting *United States* v. *Gambino*, 59 F. 3d 353, 360 (CA2 1995)). "[D]oubt[ing]

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[1]The Government dismissed the other counts before trial.

[2]The Court of Appeals ultimately remanded the case for resentencing in light of *United States* v. *Booker*, 543 U. S. 220 (2005). That issue is not before us, though we note that the District Court has indicated it would impose the same 63-month sentence if the defendant is produced for resentencing. No. 96–CR–285 (TCP) (EDNY, Oct. 27, 2005).

that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request," the Court of Appeals held that petitioner would not be heard to complain of the 91-day delay in early 1997. 401 F. 3d, at 45. The Court of Appeals went on to suggest that there "can be no doubt that the district court could have properly excluded this period of time based on the ends of justice" in light of the complexity of the case and defense counsel's request for additional time to prepare. *Ibid.*

We granted certiorari to resolve the disagreement among the Courts of Appeals on the standard for analyzing whether a defendant has made an effective waiver of rights under the Act. 546 U. S. ___ (2006).

II

As noted above, the Speedy Trial Act generally requires a trial to begin within 70 days of the filing of an information or indictment or the defendant's initial appearance, 18 U. S. C. §3161(c)(1), but the Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. See §3161(h). For example, the Act excludes "delay resulting from other proceedings concerning the defendant," §3161(h)(1), "delay resulting from the absence or unavailability of the defendant or an essential witness," §3161(h)(3), "delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," §3161(h)(4), and "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted," §3161(h)(7).

Much of the Act's flexibility is furnished by §3161(h)(8),

which governs ends-of-justice continuances, and which we set out in relevant part in the margin.[3] This provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the

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[3]Title 18 U. S. C. §3161(h)(8) provides: "(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

. . . . .

"(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

"(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

public's and defendant's interests in a speedy trial. This provision gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs.

To promote compliance with its requirements, the Act contains enforcement and sanctions provisions. If a trial does not begin on time, the defendant may move, before the start of trial or the entry of a guilty plea, to dismiss the charges, and if a meritorious and timely motion to dismiss is filed, the district court must dismiss the charges, though it may choose whether to dismiss with or without prejudice. In making that choice, the court must take into account, among other things, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." §3162(a)(2).

This scheme is designed to promote compliance with the Act without needlessly subverting important criminal prosecutions. The more severe sanction (dismissal with prejudice) is available for use where appropriate, and the knowledge that a violation could potentially result in the imposition of this sanction gives the prosecution a powerful incentive to be careful about compliance. The less severe sanction (dismissal without prejudice) lets the court avoid unduly impairing the enforcement of federal criminal laws—though even this sanction imposes some costs on the prosecution and the court, which further encourages compliance. When an indictment is dismissed without prejudice, the prosecutor may of course seek—and in the great majority of cases will be able to obtain—a new indictment, for even if "the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar months of the date of the dismissal." §3288.

With this background in mind, we turn to the questions

presented by the unusual procedures followed in this case.

III

Petitioner contends, and the Government does not seriously dispute, that a defendant may not prospectively waive the application of the Act.[4] We agree.

A

1

As our discussion above suggests, the Speedy Trial Act comprehensively regulates the time within which a trial must begin. Section 3161(h) specifies in detail numerous categories of delay that are not counted in applying the Act's deadlines. Conspicuously, §3161(h) has no provision excluding periods of delay during which a defendant waives the application of the Act, and it is apparent from the terms of the Act that this omission was a considered one. Instead of simply allowing defendants to opt out of the Act, the Act demands that defense continuance requests fit within one of the specific exclusions set out in subsection (h). Subsection (h)(8), which permits ends-of-justice continuances, was plainly meant to cover many of these requests. Among the factors that a district court must consider in deciding whether to grant an ends-of-justice continuance are a defendant's need for "reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel. §3161(h)(8)(B)(iv). If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion.

The purposes of the Act also cut against exclusion on the grounds of mere consent or waiver. If the Act were designed solely to protect a defendant's right to a speedy

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[4]We left this question open in *New York* v. *Hill*, 528 U. S. 110, 117, n. 2 (2000).

trial, it would make sense to allow a defendant to waive the application of the Act. But the Act was designed with the public interest firmly in mind. See, *e.g.*, 18 U. S. C. §3161(h)(8)(A) (to exclude delay resulting from a continuance—even one "granted . . . at the request of the defendant"—the district court must find "that the ends of justice served . . . outweigh the *best interest of the public* and the defendant *in a speedy trial*" (emphasis added)). That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely.

2

This interpretation is entirely in accord with the Act's legislative history. As both the 1974 House and Senate Reports illustrate, the Act was designed not just to benefit defendants but also to serve the public interest by, among other things, reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment. See S. Rep. No. 93–1021, pp. 6–8 (citing "bail problems," offenses committed during pretrial release, and the "seriously undermined . . . deterrent value of the criminal process" as "the debilitating effect[s] of court delay upon our criminal justice system"); H. R. Rep. No. 93–1508, p. 8 ("The purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trials . . ."). The Senate Report accompanying the 1979 amendments to the Act put an even finer point on it: "[T]he Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right—which may or may not be in accord with society's." S. Rep. No. 96–212, p. 29; see also *id.*, at 6; H. R. Rep. No. 96–390, p. 3 (1979). Because defendants may be content to remain on pretrial release,

and indeed may welcome delay, it is unsurprising that Congress refrained from empowering defendants to make prospective waivers of the Act's application. See S. Rep. No. 96–212, at 29 ("Because of the Act's emphasis on that societal right, a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish").

B

The District Court reasoned that 18 U. S. C. §3162(a)(2) supports the conclusion that a defendant may prospectively waive the strictures of the Act. This provision states that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." Because this provision in effect allows a defendant to waive a completed violation of the Act (by declining to move to dismiss before the start of trial or the entry of a guilty plea), it follows, so the District Court's reasoning went, that a defendant should be allowed to make a prospective waiver. We disagree.

It is significant that §3162(a)(2) makes no mention of prospective waivers, and there is no reason to think that Congress wanted to treat prospective and retrospective waivers similarly. Allowing prospective waivers would seriously undermine the Act because there are many cases—like the case at hand—in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest. The sort of retrospective waiver allowed by §3161(a)(2) does not pose a comparable danger because the prosecution and the court cannot know until the trial actually starts or the guilty plea is actually entered whether the defendant will forgo moving to dismiss. As a consequence, the prosecution and the court retain a strong incentive to make sure that the trial begins on time.

Instead of granting broad opt-out rights, §3162(a)(2)

serves two unrelated purposes. First, §3162(a)(2) assigns the role of spotting violations of the Act to defendants—for the obvious reason that they have the greatest incentive to perform this task.[5] Second, by requiring that a defendant move before the trial starts or a guilty plea is entered, §3162(a)(2) both limits the effects of a dismissal without prejudice (by ensuring that an expensive and time-consuming trial will not be mooted by a late-filed motion under the Act) and prevents undue defense gamesmanship.[6]

For these reasons, we reject the District Court's reliance on §3162(a)(2) and conclude a defendant may not prospectively waive the application of the Act. It follows that petitioner's waiver "for all time" was ineffective. We therefore turn to the Government's alternative grounds in support of the result below.

IV

A

The Government contends that because "petitioner's express waiver induced the district court to grant a continuance without making an express ends-of-justice find-

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[5]The possibility of obtaining a dismissal with prejudice plainly gives a defendant a strong incentive to police compliance, and even if a case is dismissed without prejudice, a defendant may derive some benefit. For example, the time and energy that the prosecution must expend in connection with obtaining a new indictment may be time and energy that the prosecution cannot devote to the preparation of its case.

[6]As noted, in order to promote compliance with the Act, Congress set the minimum permissible penalty at a level that would impose some costs on the prosecution and the court without unduly interfering with the enforcement of the criminal laws. By specifying that a defendant may not move for dismissal once the trial has commenced or a plea has been entered, the amount of inconvenience resulting from a dismissal without prejudice is limited, and defendants are restricted in their ability to use such a motion for strategic purposes. For example, defendants cannot wait to see how a trial is going (or how it comes out) before moving to dismiss.

ing . . ., basic principles of judicial estoppel preclude petitioner from enjoying the benefit of the continuance, but then challenging the lack of a finding." Brief for United States 10. In this case, however, we see no basis for applying the doctrine of judicial estoppel.

As this Court has explained:

> "'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' *Davis* v. *Wakelee*, 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' *Pegram* v. *Herdrich*, 530 U. S. 211, 227, n. 8 (2000)." *New Hampshire* v. *Maine*, 532 U. S. 742, 749 (2001).

Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test,

> "several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position .... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.*, at 750–751 (citations and internal quotation marks omitted).

In applying this doctrine to the present case, we must first identify the "position" of petitioner's that the Gov-

ernment seeks to enforce. There are three possibilities: (1) petitioner's promise not to move for dismissal under §3162(a)(2), (2) petitioner's (implied) position that waivers of the Act are enforceable, and (3) petitioner's claim that counsel needed additional time to research the authenticity of the bonds. None of these gives rise to an estoppel.

First, we are unwilling to recognize an estoppel based on petitioner's promise not to move for dismissal because doing so would entirely swallow the Act's no-waiver policy. We see little difference between granting a defendant's request for a continuance in exchange for a promise not to move for dismissal and permitting a prospective waiver, and as we hold above, prospective waivers are inconsistent with the Act.

Second, petitioner's (mistaken) agreement that Speedy Trial Act waivers are valid also does not provide a ground for estoppel. Petitioner did not "succee[d] in persuading" the District Court to accept the proposition that prospective waivers of Speedy Trial Act rights are valid. On the contrary, it was the District Court that requested the waiver and produced the form for petitioner to sign. And while the other relevant factors (clear inconsistency and unfair advantage or detriment) might in isolation support the Government, we think they do not predominate where, as here, the Government itself accepted the District Court's interpretation without objection.

Finally, petitioner's representation to the District Court at the January 31 status conference that a continuance was needed to gather evidence of the bonds' authenticity does not support the Government's estoppel argument because the position that petitioner took then was not "clearly inconsistent" with the position that he now takes in seeking dismissal of the indictment. This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized

exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds. In fact, however, the discussion at the January 31 status conference did not focus on the requirements of the Act. Rather, the court and the parties proceeded on the assumption that the court's waiver form was valid and that the Act could simply be disregarded. Nothing in the discussion at the conference suggests that the question presented by the defense continuance request was viewed as anything other than a case-management question that lay entirely within the scope of the District Court's discretion. Under these circumstances, the best understanding of the position taken by petitioner's attorney at the January 31 status conference is that granting the requested continuance would represent a sound exercise of the trial judge's discretion in managing its calendar. This position was not "clearly inconsistent" with petitioner's later position that the continuance was not permissible under the terms of the Act. Accordingly, we hold that petitioner is not estopped from challenging the excludability under the Act of the 1997 continuance.

B

While conceding that the District Court "never made an express finding on the record" about the ends-of-justice balance, Brief for United States 30, the Government argues that such an express finding did not need to be entered contemporaneously—and could be supplied on remand—because, given the circumstances in 1997, the ends-of-justice balance in fact supported the 1997 continuance. We reject this argument. In the first place, the Act requires express findings, and in the second place, it does not permit those findings to be made on remand as the Government proposes.

The Act requires that when a district court grants an ends-of-justice continuance, it must "se[t] forth, in the record of the case, either orally or in writing, its reasons" for finding that the ends of justice are served and they outweigh other interests. 18 U. S. C. §3161(h)(8)(A). Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be "granted . . . on the basis of [the court's] findings"), the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case." However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under §3162(a)(2).[7] In ruling on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days. But §3161(h)(8)(A) is explicit that "[n]o . . . period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable . . . unless the court sets forth . . . its reasons for [its] finding[s]." Thus, without on-the-record findings, there can be no exclusion under §3161(h)(8). Here, the District Court set forth no such findings at the January 31 status conference, and §3161(h)(8)(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss. Therefore, the 1997 continuance is not excluded from the speedy trial clock.

The Government suggests that this error, stemming as it does from the District Court's technical failure to make an express finding, may be regarded as harmless. Brief for United States 31, n. 8. Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively

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[7] The best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance.

applies to "*all* errors where a proper objection is made," *Neder* v. *United States*, 527 U. S. 1, 7 (1999), and we have required "strong support" to find an implied repeal of Rule 52, *United States* v. *Vonn*, 535 U. S. 55, 65 (2002). We conclude, however, that the provisions of the Act provide such support here.

The relevant provisions of the Act are unequivocal. If a defendant pleads not guilty, the trial "*shall* commence" within 70 days "from the filing date (and making public) of the information or indictment" or from the defendant's initial appearance, whichever is later. §3161(c)(1) (emphasis added). Delay resulting from an ends-of-justice continuance is excluded from this time period, but *"[n]o such period of delay . . . shall be excludable* under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." §3161(h)(8)(A) (emphasis added). When a trial is not commenced within the prescribed period of time, "the information or indictment *shall be dismissed* on motion of the defendant." §3162(a)(2) (emphasis added). A straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed. The argument that the District Court's failure to make the prescribed findings may be excused as harmless error is hard to square with the Act's categorical terms. See *Alabama* v. *Bozeman*, 533 U. S. 146, 153–154 (2001) (no "'harmless'" or "'technical'" violations of the Interstate Agreement on Detainers' "antishuttling" provision in light of its "absolute language").

Applying the harmless-error rule would also tend to

undermine the detailed requirements of the provisions regulating ends-of-justice continuances. The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of §3161(h)(8), then, is to counteract substantive open-endedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings. Excusing the failure to make these findings as harmless error would be inconsistent with the strategy embodied in §3161(h). Such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights. We thus conclude that when a district court makes no findings on the record in support of an §3161(h)(8) continuance, harmless-error review is not appropriate.

V

We hold that that the 91-day continuance granted on January 31 was not excluded from petitioner's speedy trial clock. Because this continuance by itself exceeded the maximum 70-day delay provided in §3161(c)(1), the Act was violated, and we need not address whether any other periods of delay during petitioner's case were not excludable. The sanction for a violation of the Act is dismissal, but we leave it to the District Court to determine in the first instance whether dismissal should be with or without

prejudice. See §3162(a)(2). The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–5992

JACOB ZEDNER, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2006]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the opinion of the Court with the exception of its discussion of legislative history in Part III–A–2. For reasons I have expressed elsewhere, I believe that the only language that constitutes "a Law" within the meaning of the Bicameralism and Presentment Clause of Article I, §7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute. See, *e.g.*, *Conroy* v. *Aniskoff*, 507 U. S. 511, 518–528 (1993) (SCALIA, J., concurring in judgment). Here, the Court looks to legislative history even though the remainder of its opinion amply establishes that the Speedy Trial Act is unambiguous. The Act's language rejects the possibility of a prospective waiver, and even expresses the very point that the Court relies on legislative history to support—that the Act protects the interests of the public as well as those of the defendant. See *ante*, at 9–10 (citing 18 U. S. C. §3161(h)(8)(A)). Use of legislative history in this context thus conflicts not just with my own views but with this Court's repeated statements that when the language of the statute is plain, legislative history is irrelevant. See, *e.g.*, *United States* v. *Gonzales*, 520 U. S. 1, 6 (1997). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of

a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992) (citations and internal quotation marks omitted).

It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that "Congress has expressed" thus-and-so. See, *e.g.*, *Conroy*, *supra*, at 516–517. There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court's opinion.